Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 4(a) of the Portal-to-Portal Act of 1947 provides an exception to an employer's obligation to pay wages under the Fair Labor Standards Act of 1938 ("FLSA"), for time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" and for "activities which are preliminary or postliminary to said principal activity." 29 U.S.C. § 254(a). Section 3(*o*) of the FLSA expressly excludes from payment "any time spent in changing clothes . . . at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." *Id.* § 203(*o*).

The questions presented are:

(1) Whether walking that occurs between compensable clothes-changing time and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking . . . to and from the actual place of performance of the principal activity" within the meaning of Section 4(a).

(2) Whether, after *United States* v. *Mead*, 533 U.S. 218 (2001), deference is due the Department of Labor's interpretation of the term "clothes" in Section 3(*o*), when that interpretation is embodied in an opinion letter issued by the Administrator of the Department's Wage and Hour Division, who is charged with administering and enforcing the FLSA, when Congress has provided that third parties may rely on such opinion letters, and when the opinion letter itself restores the agency's prior position?

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption. Petitioner notes that IBP, inc., is currently known as Tyson Fresh Meats, Inc.

Pursuant to Supreme Court Rule 29.6, petitioner states that IBP, inc., currently known as Tyson Fresh Meats, Inc., is a subsidiary of Tyson Foods, Inc. (NYSE: TSN).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT REQUIRED BY RULES 14.1 AND 29.6	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
A. The Fair Labor Standards Act, the Portal-to-Portal Act, and the Department of Labor	3
B. Factual Background	6
C. The Decision of the Court of Appeals	9
REASONS FOR GRANTING THE PETITION	10
I. THERE IS AN ACKNOWLEDGED AND INTOLERABLE CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE COMPENSABILITY OF "WALKING TIME" UNDER THE PORTAL ACT	11
A. There Is An Acknowledged Conflict Among The Courts Of Appeals About When Workers Are Entitled To "Walking Time" Compensation Under The Portal Act	11
B. Whether Employers Are Required To Compensate Employees For "Walking Time" Is Recurring And Important	15

TABLE OF CONTENTS—continued

	Page
C. The Ninth Circuit Erred In Holding That The "Walking Time" Here Was Compensable	17
II. THIS COURT SHOULD GRANT THE PETITION TO PROVIDE MUCH NEEDED GUIDANCE CONCERNING THE DEFERENCE DUE LESS FORMAL AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTORY TERMS	18
A. There Is Significant Confusion In The Courts Of Appeals About The Extent Of Deference Due "Less Formal" Department Of Labor Statutory Interpretations	19
B. The Degree Of Agency Deference Due "Less Formal" Agency Interpretations Is Recurring And Important	25
C. The Ninth Circuit Erred In Utterly Disregarding The Agency's Interpretation	26
CONCLUSION	27

TABLE OF AUTHORITIES

CASES

	Page
Alaska Dep't of Envtl. Conservation v. *EPA*, — U.S. —, 124 S. Ct. 983 (2004)	20
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)	4
Arcadi v. *Nestle Food Corp.*, 38 F.3d 672 (2d Cir. 1994)	9
Barnhart v. *Walton*, 535 U.S. 212 (2002)	10, 20, 24
Bejil v. *Ethicon, Inc.*, 269 F.3d 477 (5th Cir. 2001)	8, 18
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	3, 19,23, 24
Christensen v. *Harris County*, 529 U.S. 576 (2000)	19
De Asencio v. *Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003)	16
Herman v. *Fabri-Centers of Am., Inc.*, 308 F.3d 580 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003)	22
Houston Police Officers' Union v. *City of Houston, Tex.*, 330 F.3d 298 (5th Cir.), *cert. denied*, 124 S. Ct. 300 (2003)	21, 22
Krzalaic v. *Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 2641 (2003)	21, 24
Matz v. *Household Int'l Tax Reduction Inv. Plan*, 265 F.3d 572 (7th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002)	21
Nardone v. *General Motors, Inc.*, 207 F. Supp. 336 (D.N.J. 1962)	18
NationsBank of N.C., N.A. v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)	22
Reich v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994)	12, 16

TABLE OF AUTHORITIES—continued

Page

Saunders v. *John Morrell & Co.*, No. C88-4143, 1991 WL 529542 (N.D. Iowa Dec. 24, 1991) 18
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 3, 23
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 24, 26
Steiner v. *Mitchell*, 350 U.S. 247 (1956) 4, 6, 11, 13, 15
Tennessee Coal, Iron & R.R. Co. v. *Muscoda Local No. 123*, 321 U.S. 590 (1944) 4
Tum v. *Barber Foods, Inc.*, 331 F.3d 1 (1st Cir. 2003), *pet. for reh'g and reh'g en banc filed*, Nos. 02-1679, -1739 (1st Cir. June 17, 2003), *briefing ordered*, Nos. 02-1679, -1739 (1st Cir. June 26, 2003 and Aug. 18, 2003) 3, 12, 14, 17
Turner v. *City of Phila.*, 96 F. Supp. 2d 460, *aff'd*, 262 F.3d 222 (3d Cir. 2001) 9
United States v. *Mead*, 533 U.S. 218 (2001) 10, 18, 19, 23, 24

STATUTES AND REGULATIONS

29 U.S.C. § 202 3
§ 203(*o*) 2, 5
§ 204(a) 2, 5, 23
§ 206 3
§ 207 3
§ 213 10
§ 216(b) 4
§ 251 ..... 2, 4, 15
§ 254(a) 2, 5, 7
§ 259 ..... 2, 6, 23
29 C.F.R § 790.1(b) 2, 6, 23
§ 790.6 ..... 2, 14
§ 790.7 ..... 2, 14
§ 790.17(d) 2, 6

TABLE OF AUTHORITIES—continued

Page

29 C.F.R. § 1910.1030(b) 2, 8

LEGISLATIVE HISTORY

93 Cong. Rec. 2082 (1947) 4
2087 (1947) 4
2089 (1947) 4

SCHOLARLY AUTHORITIES

Robert A. Anthony, *Keeping Chevron Pure*, 5 Green Bag 371 (Summer 2002) 21
Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (4th ed. 2003 Supp.) 21, 25
William S. Jordan, *United States v. Mead: Complicating the Delegation Dance*, 31 Envtl. L. Rep. 11425 (2001) 25
Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001) 26
Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With The Force Of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002) 22
Joseph E. Tilson et al., *Litigating Lawsuits Under the FLSA—The Fastest Growing Area of Employment Litigation*, 697 PLI/Lit. 649 (Oct.-Nov. 2003) 16

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PETITION FOR A WRIT OF CERTIORARI

Petitioner IBP, inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying IBP's petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003, is unreported, and is reprinted in the Appendix to this Petition ("Pet. App.") at 83a-84a. The underlying opinion of the court of appeals was entered on August 5, 2003, is reported at 339 F.3d 894 (9th Cir. 2003), and is reprinted in the Pet. App. at 1a-34a. The findings of

fact and conclusions of law of the United States District Court for the Eastern District of Washington were entered on September 14, 2001, are unreported, and are reprinted in the Pet. App. at 35a-82a.

JURISDICTION

The opinion of the court of appeals was entered on August 5, 2003, and the order of the court of appeals denying IBP's petition for rehearing and suggestion of rehearing en banc was entered on November 28, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition involves the following provisions of the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947: 29 U.S.C. §§ 203(*o*), 204(a), 251, 254(a), 259; see also 29 C.F.R. §§ 790.1(b), 790.6(b), 790.7(c)-(g), 790.17(d), 1910.1030(b). The pertinent text of these provisions is set forth in the Pet. App. at 85a-93a.

STATEMENT OF THE CASE

As the Secretary of Labor explained in her *amicus* brief to the Ninth Circuit below, this case presents fundamental questions concerning the compensability of certain pre- and post-shift activities under the Fair Labor Standards Act of 1938 ("FLSA") and the Portal-to-Portal Act of 1947 ("Portal Act").

First, the Ninth Circuit ruled that Section 4(a) of the Portal Act, which excludes from compensation the time employees spend "walking . . . to and from" their actual work stations, does not apply to such walking if it occurs between compensable clothes-changing time and the actual work station. In so ruling, the Ninth Circuit created a square conflict with the First and Tenth Circuits, which reached precisely the opposite conclusion on this important issue. See Pet. App. 19a (acknowledging contrary interpretation of the First Circuit). Second, the Ninth Circuit ruled that certain

attire worn in the meat packing industry does not constitute "clothes" within the meaning of Section 3(*o*) of the FLSA, which excludes from compensation "any time spent changing clothes . . . at the beginning or end of each workday" in unionized facilities in certain circumstances. In so ruling, the Ninth Circuit ignored a contrary decision of the Fifth Circuit, and refused to afford either *Chevron* or even *Skidmore* deference to an opinion letter in which the Department of Labor concluded that the items of attire in question are "clothes" under Section 3(*o*). See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The decision below thus adds to the widespread confusion in the lower courts concerning (a) when agency pronouncements that are not the product of notice-and-comment rulemaking or formal agency adjudications are legally binding and (b) the degree of deference that attaches to non-binding agency pronouncements. Accordingly, this case provides the Court an opportunity to supply much needed guidance on these critical and frequently recurring questions of administrative law.

A. The Fair Labor Standards Act, the Portal-to-Portal Act, and the Department of Labor

Some familiarity with the FLSA and the Portal Act, as well as the Department of Labor's role in administering those statutes, is necessary to place the questions presented in their proper context. In 1938, Congress enacted the FLSA to establish, *inter alia*, employment compensation standards. See 29 U.S.C. §§ 202, 206, 207. That Act requires employers to "record, credit, and compensate employees for all of the time which the employer requires or permits employees to work." *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 5 (1st Cir. 2003) (citing 29 U.S.C. § 201 *et seq.*), *pet. for reh'g and reh'g en banc filed*, Nos. 02-1679, -1739 (1st Cir. June 17, 2003), *briefing ordered*, Nos. 02-1679, -1739 (1st Cir. June 26, 2003 and Aug. 18, 2003). Work is generally defined as "physical or mental exertion (whether burdensome or not)

controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Employers who violate the FLSA's requirements may face liability and liquidated damages. See 29 U.S.C. § 216(b).

In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), this Court adopted a broad interpretation of the compensation due employees with respect to certain collateral work activities. In particular, the Court held that pottery plant employees were entitled to compensation for the "30 seconds" to "8 minutes" of walking time from the plant entrance to their work stations as well as for "various preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, [and] putting on finger cots." *Id.* at 682-83, 690. In the wake of *Anderson*, there was a "vast flood of litigation" involving "vast alleged liability." 93 Cong. Rec. 2087, 2089 (1947); *id.* at 2082 (noting the "immensity of the [litigation] problem").

Congress responded to *Anderson* and the litigation it spawned by enacting the Portal Act. As this Court has recognized, the Portal Act "was designed primarily to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* . . . would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956) (citation omitted) (quoting 29 U.S.C. § 251(a)). Congress identified a litany of harms that can attend uncertainty and overbreadth in the area of employee compensation for "walking time," including: financial ruin for employers, gross inequity of competitive conditions, and windfall payments to employees. 29 U.S.C. § 251(a). Congress enacted the Portal Act (1) to "relieve" these pressures, (2) to "protect the right of collective bargaining," and (3) "to define and limit the jurisdiction of the courts." *Id.* § 251(b).

This case raises issues that implicate provisions of the FLSA and the Portal Act. First, Section 4 of the Portal Act excludes certain "walking time" from the FLSA's compensation requirements. Section 4 provides that:

> no employer shall be subject to liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay . . . for . . .
>
> > (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Id. § 254(a).

Second, in 1949, Congress added Section 3(*o*) to the FLSA, which provides:

> [i]n determining . . . the hours for which an employee is employed, there shall be excluded any time spent in *changing clothes* . . . at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Id. § 203(*o*) (emphasis added).

Congress also created the Department's Wage and Hour Division. The Administrator of the Division, who is "appointed by the President, by and with the advice and consent of the Senate," *id.* § 204(a), is charged with the

"administration and enforcement" of the FLSA, 29 C.F.R. § 790.1(b).[1] Under the FLSA, "any written administrative regulation, order, ruling,[2] approval, or interpretation" by the Administrator may be relied on by third parties as a good-faith defense against FLSA liability. 29 U.S.C. § 259.

B. Factual Background

1. IBP, inc., currently known as Tyson Fresh Meats, Inc. (referred to herein as "IBP"), is the world's largest supplier of premium beef and pork, and related products. See Pet. App. 2a. Headquartered in Dakota Dunes, South Dakota, IBP employs approximately 41,000 people. Respondents are unionized production workers at IBP's Pasco, Washington meat processing facility.

Production workers are required to wear various items, which they must don prior to arriving at their work stations. These items include a sanitary outer garment, a plastic hardhat, a hair net, ear plugs, a face shield, goggles, gloves, liquid-repelling sleeves, apron and leggings, safety boots or shoes, and a weight belt. See Pet. App. 3a-4a & n.2, 39a-40a. Moreover, "knife users" may wear additional items such as mesh metal aprons, leggings, vests, sleeves, and gloves, as well as plexiglass arm guards and Kevlar gloves. See *id.* at 4a n.2, 39a-40a. Although, for a time, collective-bargaining agreements governing IBP's employees expressly included compensation for "clothes changing" time at the beginning and end of the shift, the agreements negotiated in 1982, 1986, and 1992, as well as the current agreement, exclude "clothes

[1] In its 1949 FLSA amendments, Congress also ratified any then-effective "'order, regulation, or interpretation of the Administrator,'" unless inconsistent with the FLSA, until modified by the Administrator. *Steiner* v. *Mitchell*, 350 U.S. 247, 255 n.8 (1956) (quoting 29 U.S.C. § 208 note).

[2] "The term 'ruling' commonly refers to an interpretation made by an agency 'as a consequence of individual requests for rulings upon particular questions,'" *i.e.*, "[o]pinion letters." 29 C.F.R. § 790.17(d).

changing time." *Id.* at 4a n.3, 37a-38a. Employees must be at their work station on the production line at the time the first product arrives at their station. See *id.* at 3a.

2. In 1999, respondents filed a class action suit against IBP in the United States District Court for the Eastern District of Washington charging that certain of IBP's compensation practices violated the Portal Act and FLSA. First, respondents sought pay for time spent walking to their Pasco plant work stations after donning their work attire before the beginning of the work shifts, and time spent walking from their work stations before doffing that attire after the end of the work shifts. See 29 U.S.C. § 254(a). Second, respondents sought pay for the time spent actually donning and doffing their attire. Petitioner defended its practices on the grounds that Sections 4 and 3(*o*) excluded the time spent on both of these activities from the FLSA's compensation requirements.[3] After a bench trial, the District Court ruled for respondents on the walking time component of this petition and also determined that donning and doffing certain of the attire detailed above was compensable. See Pet. App. 35a-82a.

On appeal to the Ninth Circuit, the Secretary of Labor filed an *amicus* brief. On the Section 4 issue, the Secretary argued that time spent walking from the locker to the work station and back is compensable as being all in a day's work. With respect to the threshold question whether the attire worn by meat-packing employees constitutes "clothes" within the meaning of Section 3(*o*)'s exclusion, the Secretary explained that the Administrator had issued an Opinion Letter to a third party interpreting Section 3(*o*) to apply to certain protective clothing worn by meatpacking employees like the plaintiffs in this case. In particular, the Opinion Letter supported IBP's position and *rejected* the conclusion that "[S]ection 3(*o*) does

[3] In addition, respondents' complaint, and the opinions below, addressed several other FLSA and State law issues that are not the subject of this petition.

not apply to the putting on [or] taking off . . . of the protective safety equipment typically worn in the meat packing industry, such as mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts." *Id.* at 94a.

In her *amicus* brief, the Secretary explained that the 2002 Opinion Letter overrode a contrary interpretation adopted for the first time in 1997. In the 2002 Opinion Letter, the Administrator reasoned that the 1997 interpretation had "never previously been put forward by the Administrator" and was out of keeping with the historical treatment of Section 3(*o*) by both "a number of regional and district officials" as well as "the Office of the Solicitor." Pet. App. 94a. The 1997 opinion, moreover, "confined its reasoning to a single sentence," simply stating without explanation the legal conclusion that "'clothes' has a 'plain meaning' which excludes: (i) 'protective' articles that (ii) may be 'cumbersome in nature' and (iii) are 'worn over . . . apparel.'" *Id.* at 98a (ellipses in original). Based upon a "careful review of the interpretation of [S]ection 3(*o*)," including "a reexamination of the statute and legislative history," a review of "the history and purpose" of the provision, and consideration of an OSHA regulation that includes protective gear as a *subset* of clothing (see 29 C.F.R. § 1910.1030(b)), the Administrator restored the position to which the agency had long adhered prior to the 1997 opinion. Pet App. 96a-100a. This interpretation, the Administrator explained, reaffirms that a "function" of Section 3(*o*) is "to allow companies and unions to agree to treat as non-compensable clothes-changing activities that otherwise would be compensable under the Portal Act." *Id.* at 97a-98a.[4]

[4] Of course, such agreements can be embodied not only in a collective bargaining agreement, but in a custom or practice that can arise in a variety of ways under a collective bargaining agreement. *See, e.g., Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 (5th Cir. 2001) (per curiam) (bargaining history); *Arcadi* v. *Nestle Food Corp.*, 38 F.3d 672, 674-75 (2d Cir. 1994) (union-employer "understanding"); *Turner* v. *City of Phila.*, 96 F. Supp. 2d 460, 463 (E.D. Pa. 2000) ("acquiescence without formal negotiation"), *aff'd*, 262 F.3d 222 (3d Cir. 2001).

C. The Decision of the Court of Appeals

The United States Court of Appeals for the Ninth Circuit affirmed the District Court in relevant part. *First*, as to the Section 4 "walking time" issue, the Ninth Circuit agreed with the District Court that the workday includes "'the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment.'" Pet. App. 18a (ellipses in original). Acknowledging that the First Circuit had reached a contrary conclusion, the Ninth Circuit reasoned that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Id.* at 19a; *id.* at 19a n.10 ("*But see Tum* v. *Barber Foods, Inc.*, 331 F.3d 1 (1st Cir. 2003)").

Second, as to the Section 3(*o*) clothes-changing exclusion, 29 U.S.C. § 203(*o*), the Ninth Circuit affirmed the District Court's interpretation that Section 3(*o*) did not exclude the "time spent putting on personal protective equipment" from compensation requirements. Pet. App. 17a. Notwithstanding the careful consideration reflected in the 2002 Opinion Letter, the Ninth Circuit rejected the Administrator's interpretation as a "new, inconsistent interpretation" and, without further analysis, accorded the letter no deference. See *id.* at 17a n.9.

Treating Section 3(*o*)'s exclusion as an exemption, the panel relied heavily upon the general notion that exemptions are not permitted "'except [in contexts] *plainly and unmistakably* within the[] [given exemption's] terms and spirit.'" Pet. App. 16a (quoting *Klem* v. *County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000)) (alterations and

emphases in original).[5] The panel concluded that there was no such "plain and clear § 3(*o*) fit" for respondents' protective gear. *Id.* Finally, the court observed that specialized protective gear is "different in kind from typical clothing" in the sense that the "admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit." *Id.* The Ninth Circuit thus concluded that "from both a regulatory and common sense perspective, 'changing clothes' means something different from 'donning required specialized personal protective equipment'" and IBP was therefore not entitled to Section 3(*o*)'s exclusion. *Id.* at 16a-17a.

REASONS FOR GRANTING THE PETITION

This case presents two fundamental and recurring questions of federal law. First, at least three courts of appeals have issued conflicting decisions on the scope of the Portal Act's "walking time" provision. Review by this Court is thus plainly warranted to provide uniformity on an issue that has profound implications for the economy as a whole.

Second, there is widespread confusion in the courts of appeals concerning (a) the circumstances in which agency pronouncements that are not the product of notice-and-comment rulemaking or formal adjudications—such as the Department of Labor Opinion Letter at issue in this case—are entitled to *Chevron* deference, and (b) what deference, if any, attaches to non-binding agency pronouncements, particularly where, as here, the agency overturns a recent, and aberrant, interpretation. Indeed, the lower courts have expressed considerable frustration in attempting to apply this Court's decisions in *United States* v. *Mead*, 533 U.S. 218 (2001), and *Barnhart* v. *Walton*, 535 U.S. 212 (2002), to less formal

[5] Section 3(*o*) is contained in the definitions section of the FLSA. By contrast, exemptions from the Act's overtime and minimum wage requirements are set forth in Section 13 of the FLSA. 29 U.S.C. § 213.

agency pronouncements. This case thus affords the Court an opportunity to provide much needed guidance on these critical and frequently recurring questions of administrative law.

I. THERE IS AN ACKNOWLEDGED AND INTOLERABLE CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE COMPENSABILITY OF "WALKING TIME" UNDER THE PORTAL ACT.

There is an acknowledged and irreconcilable conflict among the courts of appeals on the fundamental issue whether employees are entitled to compensation under the Portal Act for "walking time" between arguably compensable pre- and post-shift clothes changing and the actual work station. This Court has long recognized its "importan[t]" role in interpreting the Portal Act, especially where, as here, there is "a conflict between the circuits on the subject." *Steiner* v. *Mitchell*, 350 U.S. 247, 248 (1956). Because, as Congress itself expressly found, a breathtaking array of harms can attend uncertainty and overbreadth concerning the compensability of "walking time," the Court should decide this important yet unresolved issue of statutory interpretation.

A. There Is An Acknowledged Conflict Among The Courts Of Appeals About When Workers Are Entitled To "Walking Time" Compensation Under The Portal Act.

The decision below creates a conflict over whether Section 4(a) requires employers to compensate employees for all walking time that occurs between an employee's actual work station and pre- and post-shift activities, such as clothes changing, which might be deemed compensable if they are found to be "integral and indispensable" to the employee's principal work activity. The Ninth Circuit answered that question in the affirmative. It reasoned that, because the donning of protective attire is an integral and indispensable

preliminary work activity, it is therefore a "'principal [work] activity,'" such that "[a]ll activities performed thereafter—such as 'walking'—thus occur during the 'principal' workday and are compensable." Pet. App. 18a (quoting *Steiner*, 350 U.S. at 252-53).

By contrast, as the Ninth Circuit acknowledged, the First Circuit squarely rejected the very reasoning the Ninth Circuit adopted. The First Circuit concluded that, even if clothes donning and doffing is an integral part of the employees' principal activity, walking that occurs after such donning (but prior to arrival at the work station) and before such doffing (after departure from the work station) is not compensable. *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003). The Tenth Circuit has likewise held that even where the donning and doffing of personal protective equipment at a similar IBP facility "was a compensable work activity," employees were not entitled to compensation for post-donning and pre-doffing walking time. *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994).

More specifically, the courts of appeals disagree about whether the right to compensation can start and stop during the day. On the one hand, the Ninth Circuit found "nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." Pet. App. 19a. By contrast, as the Tenth Circuit described it, even compensable clothes changing is not the "first and last principal activit[y] of the workday which would commence and toll the running of the timeclock" such that all walking time between clothes changing and the work station is compensable. *Reich*, 38 F.3d at 1127. The First Circuit implicitly adopted the Tenth Circuit's reasoning by ruling that, even where clothes changing is integral to the employee's principal activity, walking time to and from the work station may be excluded. *Tum*, 331 F.3d at 6.

At the heart of this disagreement is the Ninth Circuit's misunderstanding of this Court's decision in *Steiner*. There, the Court held that:

> activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are [1] an integral and indispensable part of the principal activities for which the covered workmen are employed *and* [2] *are not specifically excluded by Section 4(a)(1).*

350 U.S. at 256 (emphasis added). The "integral and indispensable" activities at issue in *Steiner* were "changing clothes at the beginning of the shift and showering at the end." *Id.* at 248. Because there was no claim in *Steiner* that walking to and from the actual work station was itself an "integral and indispensable" activity, there was no need to exclude such walking time from the category of compensable "indispensable" activities. Accordingly, *Steiner*'s reference to activities "not specifically excluded by Section 4(a)(1)" can only be understood as a clarification that an "integral and indispensable"—and therefore compensable—activity does not render compensable all walking that occurs between that "integral and indispensable" activity and the work station.

Indeed, the Department of Labor has made this very point. In provisions directly addressing preliminary and postliminary activities, the Department has appended the following footnote:

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity'. See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. *This does not necessarily mean, however, that travel between the washroom or clothes-changing place*

and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which 4(a)[(1)] refers.

29 C.F.R. § 790.7(g) n.49 (citation omitted; emphasis and alteration added). Like this Court's decision in *Steiner*—which also relied extensively on colloquies between Senators McGrath and Cooper—the Department's adoption of this explanation makes clear that a compensable "integral and indispensable" activity does not render compensable all time spent walking between that activity and the actual work station. See *Tum*, 331 F.3d at 6 (relying on this provision to reach a result contrary to that of the court below).[6]

Accordingly, there is a well-developed, clear, and irreconcilable conflict among the courts of appeals about the applicability of Section 4 to walking time that occurs between the work station and compensable clothes-changing activity. That conflict plainly warrants this Court's review.

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[6] This conclusion is further buttressed by the use of the phrase "actual place of performance" in Section 4(a)(1), which "emphasizes that the ordinary travel at the beginning and end of the workday . . . includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity." 29 C.F.R. § 790.7(e); *see id.* § 790.7(f) (walking "between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity" generally is exempted under Section 4(a)). In addition, where, as here, "an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there for work in accordance with the employer's requirement." *Id.* § 790.6(b). Here, employees must report to their work stations on the production line at the time the first meat arrives at their own stations for processing. *See* Pet. App. 3a-4a.

B. Whether Employers Are Required To Compensate Employees For "Walking Time" Is Recurring And Important.

The conflict created by the courts of appeals presents a core and recurring issue with profound implications for the Nation's economy as a whole. Accordingly, it should be answered definitively now.

This Court has long recognized "the importance of the interpretation of the portal-to-portal provisions in the administration of the Fair Labor Standards Act." *Steiner*, 350 U.S. at 248. Indeed, in enacting the Portal Act, Congress found that uncertainty and overbreadth in the interpretation of the FLSA causes numerous significant harms to the national economy. As the text of the statute itself recites, these harms include: (1) the "financial ruin of many employers" and "serious[] impair[ment of] the capital resources of many others"; (2) "seriously impair[ing]" "the credit of many employers"; (3) "extended and continuous uncertainty on the part of industry"; (4) "gross inequity of competitive conditions between employers and between industries"; (5) "windfall payments" to employees for "activities performed by them without any expectation of reward beyond that included in their agreed rates of pay"; (6) "interfere[nce] with" "voluntary collective bargaining" and the creation of "industrial disputes between employees and employers and between employees and employees"; (7) courts nationwide "be[ing] burdened with excessive and needless litigation"; (8) the Public Treasury "be[ing] deprived of large sums of revenues"; (9) the cost of goods and services to the government "be[ing] unreasonably increased," including "serious[]" increases in the "cost of war contracts"; and (10) "serious and adverse effects upon the revenues of Federal, State, and local governments." 29 U.S.C. § 251(a). The Ninth Circuit's broad reading of Section 4 and the existing uncertainty in the courts of appeals gives rise to many, if not all, of the same concerns.

Commentators have noted, for example "the dramatic increase in the use of FLSA class actions," such as the lawsuit here. Joseph E. Tilson et al., *Litigating Lawsuits Under The FLSA—The Fastest Growing Area Of Employment Litigation*, 697 PLI/Lit. 649, 657 (Oct.-Nov. 2003). This litigation explosion threatens to tax judicial resources and threatens employers with massive and unexpected liabilities—two of the very evils the Portal Act was meant to prevent. "Although, in the typical case, each individual's claim . . . is generally small, when plaintiffs join together . . . the resulting damages (and attorneys' fees) can be immense." *Id.* at 655. Indeed, "[t]he aggregation of claims, particularly as class actions, profoundly affects the substantive rights of the parties to [a] litigation. Notably, aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants. The more aggregation, the greater the effect on the litigation." *De Asencio* v. *Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003) (discussing both FLSA opt-in and Rule 23 opt-out state-law classes in clothes-changing case).

Similarly, the split of authority among the circuits creates unfair disparities in competitive conditions that can harm not only employers, but also workers in particular regions of the country. This very case creates the anomalous result that employees at the same company may be entitled to different "walking time" compensation depending upon the circuit in which their work facility is located. Compare Pet. App. 17a-19a ("walking time" compensable for workers at IBP facility in the Ninth Circuit), and *Reich*, 38 F.3d at 1127 ("'walk[ing] time'" not compensable for workers at IBP facility in the Tenth Circuit). This disparity creates incentives for companies to relocate jobs to States outside the Ninth Circuit, and thus threatens to impose job losses and gains not based on market considerations but on the non-uniform application of federal law. Indeed, many other industries that involve work requiring use of protective gear are affected by these

anomalous results, including, for example, the poultry-processing, pharmaceutical, medical equipment, oil and gas processing, biotechnology, and other manufacturing industries. In sum, the proper interpretation of Section 4(a) should be answered definitively for the benefit of all employers and employees nationwide.

C. The Ninth Circuit Erred In Holding That The "Walking Time" Here Was Compensable.

Finally, the Court should grant review to correct the Ninth Circuit's erroneous interpretation of the Portal Act. Not only does the decision below misread this Court's decision in *Steiner* and ignore Labor Department guidance, but also it is not faithful to the purpose of the Portal Act, which was to minimize mandatory compensation for pre- and post-shift walking time. Indeed, as the First Circuit has recognized, "Congress did not intend for most types of walking to be compensable." *Tum*, 331 F.3d at 6; see also *id.* ("By stretching the traditional understanding of primary activity to cover donning and doffing in very limited circumstances, Congress was not creating an avenue to circumvent" Section 4(a)).

Moreover, as the First Circuit points out, the rule adopted by the Ninth Circuit below leads to "nonsensical" results. *Id.* In some facilities, for example, employees walk between several gear distribution locations before arriving at their work station. Under the Ninth Circuit's decision, employers can seek to avoid or minimize compensable walking time "by placing all of the items at one location instead of at a few locations" or by placing changing locations closer to work stations. *Id.* These decisions would not be driven by any legitimate interest in efficiency, but rather by an artificial effort to avoid liability for walking time that Congress never intended to make compensable.

For all of these reasons, the Court should grant the petition to correct the Ninth Circuit's error, to answer this important

and recurring question of federal law, and to end the irreconcilable conflict among the courts of appeals.

II. THIS COURT SHOULD GRANT THE PETITION TO PROVIDE MUCH NEEDED GUIDANCE CONCERNING THE DEFERENCE DUE LESS FORMAL AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTORY TERMS.

The Ninth Circuit's decision also creates a conflict among the circuits concerning the proper interpretation of the term "clothes" in Section 3(*o*). The Fifth Circuit rejected as "nonsensical" the claim that "sanitary garments . . . are not 'clothes' under § 203(*o*)." *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (per curiam); see also *Saunders* v. *John Morrell & Co.*, No. C88-4143, 1991 WL 529542, at *1, *4 (N.D. Iowa Dec. 24, 1991) (Section 203(*o*) applies to exclude time spent by meatpacking employees in changing into and out of "steel-mesh gloves, synthetic-mesh gloves, goggles, helmets, arm guards, belly guards, knife and cut resistant gloves, knife guards, steel-toed shoes, rubber boots, rubber gloves, rubber aprons, and steel-mesh aprons"); *Nardone* v. *General Motors, Inc.*, 207 F. Supp. 336, 338, 340 (D.N.J. 1962) (time spent by metal finishers in changing into and out of "coveralls, gloves, aprons, goggles and hoods" excluded from compensation by Section 203(*o*)).

The Ninth Circuit, by contrast, concluded that certain attire worn in the meat-packing industry falls outside the ambit of the term "clothes." Pet. App. 16a-17a & n.9. Although the agency charged with administering and enforcing the FLSA has issued an Opinion Letter that interprets this very term to encompass the attire at issue in this case, the Ninth Circuit flatly dismissed the agency's interpretation as a "new" and "inconsistent" view that was entitled to no deference. *Id.* at 17a n.9. This decision thus provides an opportunity to resolve the decisional conflict concerning Section 3(*o*) and for the Court to clear up significant confusion in the circuits in the wake of *United States* v. *Mead*, 533 U.S. 218 (2001), about

the appropriate degree of deference due agency interpretations that (i) are the result of less formal processes than formal notice-and-comment rulemaking and (ii) restore a prior agency position.

A. There Is Significant Confusion In The Courts Of Appeals About The Extent Of Deference Due "Less Formal" Department Of Labor Statutory Interpretations.

The Ninth Circuit's refusal to defer to an agency opinion letter implicates a key open question concerning the degree of deference due agency interpretations that are not the product of notice-and-comment rulemaking or formal adjudications. The considerable confusion, and unusual expressions of frustration, that this question has occasioned in the lower courts demonstrates the pressing need for guidance from this Court.

1. Prior to the decision in *United States* v. *Mead*, 533 U.S. 218 (2001), this Court stated in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), that agency "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference," *id.* at 587—*i.e.*, the legally binding effect given to formal and non-arbitrary interpretations of ambiguous statutory provisions by the agency charged with administering those provisions. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In *Mead*, however, the Court appeared to retreat from *Christensen*'s broad statement, explaining that *Chevron* deference may still apply to less formal agency statutory interpretations "when it appears that Congress delegated authority to the agency generally to make rules carrying out the force of law"—a showing that may be made "in a variety of ways." 533 U.S. at 226-27.

Shortly thereafter, in *Barnhart* v. *Walton*, 535 U.S. 212 (2002), the Court confirmed its apparent departure from the stark language of *Christensen*, observing that even where an agency "reached its interpretation through means less formal than 'notice and comment' rulemaking," this "does not automatically deprive that interpretation of the judicial deference otherwise its due" under *Chevron*. *Id.* at 221. "If this Court's opinion in *Christensen* . . . suggested an absolute rule to the contrary, our later opinion in . . . *Mead* . . . denied the suggestion." *Id.* at 222 (citations omitted).[7] The Court went on to state that:

> the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Id. Put another way, whether *Chevron* deference is due "depends in significant part upon the interpretive method used and the nature of the question at issue." *Id.*

Thus, while the Court has clearly stated that some set of agency interpretations derived from less formal means are entitled to *Chevron* deference, and has specifically left open the possibility that agency opinion letters may qualify for such treatment, it remains entirely unclear which "less formal" interpretations are entitled to such deference. Indeed,

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[7] The Court again confirmed its full retreat from *Christensen* in *Alaska Department of Environmental Conservation* v. *EPA*, where it conspicuously omitted "opinion letters" from its quotation of *Christensen*: "'Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.'" — U.S. —, 124 S. Ct. 983, 1001 (2004) (ellipses in original).

numerous courts and commentators have openly sought clarification of the "important questions [left] unanswered" by *Mead* and *Barnhart*. Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 5, 10 (4th ed. 2003 Supp.); see, *e.g.*, Robert A. Anthony, *Keeping Chevron Pure*, 5 Green Bag 371, 371 (Summer 2002) (*Barnhart* has "sow[n] the seeds of grievous confusion in the law of *Chevron* deference"). As Judge Richard Posner put it, although *Barnhart* suggests "a merger between *Chevron* deference and *Skidmore*'s . . . approach" of varying deference according to the circumstances, after *Barnhart*, all that is clear is that *Chevron* deference *may* be due where there is "something more formal, more deliberative, than a simple announcement." *Krzalaic* v. *Republic Title Co.*, 314 F.3d 875, 879, 881 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 2641 (2003). Exactly what that "something" may be, however, remains elusive. "After *Mead*, it is possible to know only that . . . less formal pronouncements like interpretive rules and informal adjudications may or may not be entitled to *Chevron* deference." Davis & Pierce, Jr., *supra*, § 3.5, at 6-7; see *Matz* v. *Household Int'l Tax Reduction Inv. Plan*, 265 F.3d 572, 575 (7th Cir. 2001) (although *Mead* indicated "that *Chevron* deference may apply to interpretations developed from less formal rulemaking procedures, it did not expressly outline when this would be the case"), *cert. denied*, 535 U.S. 954 (2003).

2. In particular, there is considerable confusion in the lower courts concerning the degree of deference due the very type of agency pronouncement that was at issue in *Christensen* and is again at issue here—a Labor Department opinion letter. As Judge Edith Jones observed on behalf of the Fifth Circuit, "reliance on *Christensen* wholly to forestall our deferring to these authorities is . . . misplaced" after *Barnhart* and *Mead*. *Houston Police Officers' Union* v. *City of Houston, Tex.*, 330 F.3d 298, 304 n.7 (5th Cir.), *cert. denied*, 124 S. Ct. 300 (2003). But the court also recognized:

"Nor is it clear, after . . . *Mead* . . . whether these pronouncements are sufficiently authoritative to merit *Chevron* deference." *Id.* at 304-05 (citation omitted). Similarly, a recent opinion from the Sixth Circuit reflects the confusion over what level of deference applies to these interpretations. See *Herman* v. *Fabri-Centers of Am., Inc.*, 308 F.3d 580, 592 (6th Cir. 2002) (acknowledging the "great deference" generally accorded the officers and agency charged with statutory enforcement, but merely noting "[t]he informative nature" of the Administrator's opinion letters and stating "we would hold as we do even in the absence of such opinion letters"), *cert. denied*, 537 U.S. 1245 (2003).

Much of this confusion arises from the fact that, while *Mead* requires courts to focus on Congress's intent in delegating power to the agency to determine whether an agency's action has the force of law, it "[u]nfortunately[] . . . provides incomplete guidance about how courts should undertake this inquiry." Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With The Force Of Law: The Original Convention*, 116 Harv. L. Rev. 467, 470 (2002). In particular, neither *Mead* nor any subsequent case answers the fundamental question: "what language must Congress use to indicate that an agency has been given power to make rules with the force of law?" *Id.* at 591.

Because there is a clear and significant need for an elaboration of *Mead*'s standards generally, and in particular their application to the recurring question of the deference due a Department of Labor opinion letter, this Court should grant the petition and rule that the power Congress bestowed on the Administrator with respect to opinion letters entitles such letters to *Chevron* deference. The opinion letters of the Administrator are equivalent to the opinion letters of the Comptroller of the Currency, whose "deliberative conclusions" concerning the meaning of a banking statute were entitled to *Chevron* deference. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257

(1995) (internal quotation marks omitted). Just as the Comptroller has "'personal authority' under the National Bank Act," and "'is charged with the enforcement of banking laws,'" *Mead*, 533 U.S. at 231 & n.13, so too here, the Administrator is appointed by the President, confirmed by the Senate, and is charged with "administration and enforcement" of the FLSA, 29 U.S.C. § 204(a); see 29 C.F.R. § 790.1(b). Moreover, in stark contrast to the United States Customs Service tariff classification rulings at issue in *Mead*, Congress intended the opinion letters at issue here to have the force of law in the sense that they may be relied on by third parties as a good-faith defense against FLSA liability. See 29 U.S.C. § 259(a). Cf. *Mead*, 533 U.S. at 223, 231-32, 233 (finding "no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law" where, for example, the rulings "make[] it clear that a letter's binding character as a ruling stops short of third parties," and "'no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any [other] transaction'").

3. The current uncertainty about when *Chevron* deference applies necessarily implicates the degree of deference owed agency interpretations that reflect a considered change in position, as was true of the opinion letter at issue here. Before *Mead* and *Barnhart*, agency consistency was analyzed differently depending upon whether the agency's interpretation was entitled to *Chevron* deference, or to the less robust deference described in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Thus, the deference due under *Skidmore* varied according to Justice Jackson's familiar host of factors which included, among other things, the "consistency with earlier and later pronouncements." *Id.* at 140. Conversely, *Chevron* recognized that an agency may have a range of reasonable choices "not instantly carved in stone," but subject to reconsideration "on a continuing basis." 467 U.S. at 863-84. Under *Chevron*, therefore, it is "entirely

appropriate" for an agency's interpretation to change, considering that agencies are part of the "political branch of the Government" tasked with "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66; see *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency" provided its changes are not "[s]udden and unexplained").

Barnhart suggests, however, that an agency's consistency may be a consideration in determining whether *Chevron* deference is due at all. Emphasizing that "the Agency's interpretation is one of long standing," the Court in *Barnhart* suggested that this "careful consideration the agency has given over a long period" contributed to "indicate that *Chevron*" applied. 535 U.S. at 221-22; see also *Mead*, 533 U.S. at 247, 249-50 (Scalia, J., dissenting) ("*Skidmore* deference gives the agency's *current* position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future.") (emphasis added; emphasis in original omitted). Indeed, Judge Posner has interpreted *Barnhart* to suggest "a merger between *Chevron* deference and *Skidmore*'s," leaving the lower courts in a "thicket" of unanswered questions. *Krzalaic*, 314 F.3d at 879, 881.

This case thus presents an opportunity to resolve the current confusion. The lower court simply rejected the Administrator's Opinion Letter because it reflected a change in position from a prior interpretation adopted in 1997. If, as petitioner contends, the Administrator's opinion letters are entitled to *Chevron* deference, the lower court's action was plainly erroneous. Alternatively, if, as *Barnhart* suggests, agency consistency is a factor in determining *whether Chevron* deference applies, the Administrator's thoughtful

and well-reasoned decision to repudiate a recent interpretation, and reinstitute a prior position of far longer standing, affords this Court an opportunity to answer the many questions that *Barnhart* raised in this area.

B. The Degree Of Agency Deference Due "Less Formal" Agency Interpretations Is Recurring And Important.

That the degree of deference due "less formal" agency interpretations of statutory terms is an important and recurring question is self-evident. Indeed, it implicates a core question of administrative law: in what circumstances must courts defer to an agency's interpretation of ambiguous statutory provisions. As is apparent from the above discussion, confusion about the degree of deference due the Department of Labor's opinion letters alone presents an important, recurring and unanswered question.

The need for guidance on the degree of deference due a variety of "less formal" agency determinations also reverberates through a number of agency contexts. As one leading commentator explains, the "[c]ircuit courts are struggling in their efforts to apply . . . *Chevron* to a variety of types of agency pronouncements." Davis & Pierce, Jr., *supra*, § 3.5, at 10. Described another way, the Court's recent cases "leave[] us searching for the tests that might determine which informal adjudications qualify for *Chevron* deference," but "[u]nfortunately, we have no idea" what appropriate lawmaking procedures might be. William S. Jordon, *United States v. Mead: Complicating the Delegation Dance*, 31 Envtl. L. Rep. 11425, 11428-29 (2001).

Accordingly, the Court should grant certiorari to provide additional direction to the courts of appeals for determining whether, in general, "less formal" agency interpretations such as opinion letters are entitled to *Chevron* deference and, in particular, whether the Administrator's opinion letters are so entitled.

C. The Ninth Circuit Erred In Utterly Disregarding The Agency's Interpretation.

In all events, the Ninth Circuit below erred by rejecting out of hand the agency's "new" interpretation. If *Chevron* applies, the Ninth Circuit erred in disregarding the agency's view where the agency did not succumb to the "pitfalls" of agency change (such as making "[s]udden and unexplained change"), given that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley*, 517 U.S. at 742. If *Skidmore* applies, the Ninth Circuit erred by "ignor[ing] the agency interpretation." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 855 (2001). The Ninth Circuit failed to "assess that interpretation against multiple factors and determine what weight [it] should be given" in a "nuanced, context-sensitive rubric" *Id.* at 836, 855. Thus, to the extent *Chevron* does not apply, this case presents an opportunity for the Court to clarify that, even under *Skidmore*, courts cannot refuse to defer to a well-reasoned change in an administrative interpretation simply because the new interpretation represents a change in agency position.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 26, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 02-35042, 02-35110.

GABRIEL ALVAREZ, individually and as class representative; RANULFO GUTIERREZ, individually and as class representative; PEDRO HERNANDEZ, individually and as class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellees,

v.

IBP, INC., a Delaware corporation,
Defendant-Appellant.

GABRIEL ALVAREZ, individually and as class representative; RANULFO GUTIERREZ, individually and as class representative; PEDRO HERNANDEZ, individually and as class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellants,

v.

IBP, INC., a Delaware corporation,
Defendant Appellee.

Argued and Submitted April 8, 2003.
Filed Aug. 5, 2003

Appeal from the United States District Court for the Eastern District of Washington; Robert H. Whaley, United States District Judge, Presiding. D.C. No. CV-98-05005-RHW.

Before D.W. NELSON, THOMAS, Circuit Judges, and ILLSTON, District Judge.[1]

THOMAS, Circuit Judge.

Perhaps the packing plant employees in Pasco, Washington, should have heeded Henry David Thoreau's warning to "beware of all enterprises that require new clothes." The central dispute in this class action lawsuit is whether IBP, Inc. ("IBP") should be required to compensate its employees for the time it takes to change into required specialized protective clothing and safety gear. Under the circumstances presented by this case, we conclude that it must. We affirm in part and reverse in part.

I

From the time that publication of Upton Sinclair's novel *The Jungle* provoked President Theodore Roosevelt to secure passage of the Meat Inspection Act of 1906, the meat packing industry has been one of the most regulated businesses in the United States. This is not only a product of concerns over food purity. According to the United States Department of Labor's Bureau of Labor Statistics, employment at a packing plant is still one of the most dangerous jobs in America, with multiple thousands of workers injured on the job every year. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Industry Injury and Illness Data* (2002), *at* http://www.bls.gov/iif/oshsum.htm.

IBP, Inc. is the world's largest producer of fresh beef, pork, and related products. Headquartered in Dakota Dunes, South Dakota, IBP operates a number of meat processing plants throughout the American West and Midwest. Through meat-related innovation and gradual corporate acquisition, IBP has built a substantial food empire, reaping over $13 billion in

[1] The Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

sales in 1999 alone.

Among IBP's many meat processing facilities is a "kill and processing plant" in Pasco, Washington ("the Pasco plant"). As the moniker suggests, the Pasco plant includes slaughter and processing work sections, both of which play a direct role in the carcass "disassembly process." The disassembly of a beef carcass takes two-to-three days. After the animal is killed, the carcass moves along a series of chains in the slaughter division, eventually coming to rest in a cooled storage facility. After remaining in storage for at least twenty-four but no more than forty-eight hours, the carcass is transported across a group of chains and belts in the processing division, where processing employees cut, trim, and divide the carcass into a variety of pieces.

The Pasco plant divides its slaughter and processing staffs into separate work crews, assigning these crews to work shifts. Pasco plant production line employees, who are represented by Teamsters Local Union No. 556 and who are covered by a collective bargaining agreement, are required to be at their work stations and prepared to work as the first piece of meat comes across the production line. However, before they are able to assume their work stations all Pasco plant employees must complete a number of preliminary tasks, and before employees may leave the Pasco plant at the end of a shift, most of these preliminary tasks must be completed in inverse form. Each Pasco plant job classification has specific tool, supply, walk-time, and gear requirements, so each employee's preliminary and postliminary duties are somewhat distinct; still, for all Pasco plant production line employees, a general pattern obtains: At the start of a shift, Pasco plant employees must gather their assigned equipment, don that equipment in one of the Pasco plant's four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors. At the end of every shift, employees must clean, restore, and

replace their tools and equipment, storing all of it at the Pasco plant itself.[2]

Until July of 1998, the Pasco plant's shifts ran eight hours, the first four-hour block of which was split by a paid fifteen-minute rest-break, and the two four-hour spans of which were divided by a thirty-minute unpaid meal break.[3] In July of 1998, IBP restructured its shift time to include four minutes of so-called "clothes" time, thereby reducing the overall work time to seven hours and fifty-six minutes. In the fall of 1999, the Pasco plant reduced its shift time to seven hours and fifty-

[2] The record is replete with lists of outer garments and protective equipment the Pasco plant employees must don and doff. The district court's findings of fact on this point are thorough. In sum, all employees must wear a sanitary outer garment that is provided and washed each night by IBP; all employees must wear some form of a plastic hardhat, a hair net, and ear plugs, and all employees—save "gutter" employees in the slaughter division—must wear a face shield or safety goggles; all employees wear some sort of glove, with most processing employees using a number of sets per day of grip-facilitative and warmth-providing "yellow cotton gloves," and with some slaughter employees donning these yellow gloves and/or plastic or rubber gloves for enhanced grip and protection against blood and water saturation; all employees wear liquid-repelling sleeves, aprons, and leggings; all employees wear safety boots/shoes, all of which must be wiped/hosed after the end of a shift; and many employees opt to wear weight-lifting-type belts to prevent back injury. In addition, so-called "knife users" don an assortment of protective gear on their hands, arms, legs, and torsos; this gear often constitutes chain-link (i.e., "mesh") metal aprons, leggings, vests, sleeves, and gloves, and plexiglass arm guards, Kevlar gloves (that is, "can't cut" or "Polar" gloves), and puncture-resistant protective sleeves.

[3] In the early 1970's, the Pasco plant's first proprietor, Columbia Foods, entered a collective bargaining agreement with the union in which employees were allotted thirty minutes per week for "clothes changing." In 1976, IBP purchased the Pasco plant from Columbia Foods, and included a similar "clothes changing" provision in the 1979 iteration of the bargaining agreement. In the 1982, 1986, 1992, and current versions of the collective bargaining agreement, however, "clothes changing time" was negotiated but excluded.

one minutes. Long-running litigation between IBP and the United States Department of Labor (hereinafter "USDOL") in the 1990s spurred much of IBP's shift-time reduction. In the course of that litigation, damage and wage issues comparable to those raised in this case were decided, but the litigation focused singularly on IBP's non-unionized plants. *See Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir.1994) (holding IBP liable for unpaid pre-shift and post-shift donning, doffing, and cleaning of special packinghouse industry safety equipment and for time spent between waiting to pick up and return knives).[4]

Once a shift begins, the Pasco plant employees' time is strictly regulated and monitored. As a rule, employee rest or meal-break time begins as soon as the last piece of meat passes on the production line, and, as a rule, employees must be completely prepared to resume work as soon as the break period ends. When departing the processing and slaughter floors—whether to go to the cafeteria or to the restroom[5]—employees are permitted to leave only hats, hairnets, goggles, earplugs, and boots in place; outer garments, protective gear, gloves, scabbards, and chains must be removed. For many Pasco plant employees, the operation of IBP's mandatory donning and doffing rules necessarily impinges—if not more—their unpaid thirty-minute meal break time.

[4] Apparently as a consequence of IBP's decision to relocate its knife distribution areas and to reposition sinks along its production line, IBP and USDOL agreed to lower an initial fourteen-minute figure to four minutes in 1998. In April 1998, the Department of Labor filed a second complaint against IBP, seeking back pay for post-*Reich* FLSA violations at IBP's non-unionized plants. *See Herman v. IBP,* 98-CV-2163-JWL (D.Kan.).

[5] IBP "strongly encourages" its employees to use the restroom only during unpaid meal break time, expressly limiting non-break-time restroom use to situations of emergency. "Such emergencies," IBP instructs its employees, "should seldom occur."

To help monitor employee arrival and departure times, IBP instituted a mandatory, computerized "swipe card" system at the Pasco plant. IBP does not use the data its swipe card system gathers in calculating employee pay. Instead, IBP pays its Pasco plant employees according to a "gang time pay" model, which bases employee remuneration entirely on the times during which employees are actually cutting and bagging meat. Under this "gang time" framework, the period in which IBP considers its employees to be performing compensable work commences with the processing of the first piece of meat and ends with the processing of the last, notably excluding any time spent abiding the Pasco plant's required pre or post-shift routines.

In 1999, believing parts of IBP's compensation practices to be unlawful, the Pasco plant's slaughter and processing employees brought this class action suit under § 16(b) of the Fair Labor Standards Act ("FLSA"), *see* 29 U.S.C. § 216(b) (1999), and related provisions of Washington's Minimum Wage Act ("WMWA") in United States District Court for the Eastern District of Washington. Three aspects of their work-day animated plaintiffs' claim: (1) the pre-shift donning of protective gear and the preparation of work-related tools, including the attendant waiting and walking; (2) the requisite donning and doffing of protective gear during the thirty-minute unpaid meal break; and (3) the post-shift doffing, cleaning, and storing of protective gear and tools.

In response to plaintiffs' complaint, IBP promptly filed a motion for summary judgment with the district court, raising a series of interrelated state and federal defenses to plaintiffs' claims. Rejecting IBP's Labor Management Relations Act preemption theory, the district court granted in part and denied in part IBP's first summary judgment motion.

Just over a year later, the district court denied another of IBP's motions for summary judgment, concluding that Washington state courts were "likely" to adopt a per-hour

standard of minimum wage compliance under the WMWA because (1) the Washington legislature refused to incorporate correlative FLSA language, thereby refusing to adopt FLSA's uniform application of the workweek standard, and (2) the Washington Supreme Court had condoned the use of a per-hour method in *Seattle Professional Engineering Employees Association v. Boeing Co.*, 139 Wash.2d 824, 991 P.2d 1126 (2000), placing that court's imprimatur on a non-workweek approach in certain contexts.

A month later, the district court issued a multi-part order, excluding plaintiffs from the ambit of the Revised Code of Washington § 49.46.130(2)(g)(ii)'s exemption of "agricultural workers" from Washington's forty-hour week rule, finding IBP's potentially willful violation of plaintiffs' rights preclusive of summary judgment on plaintiffs' exemplary damage claim, declaring IBP's putative good faith too dubious to allow summary judgment, and rejecting IBP's efforts to import the holding of *Reich*, 38 F.3d at 1123, wholesale regarding what activities are and are not compensable. A twenty-day bench trial followed.

In spring of 2001, plaintiffs filed a particularized motion for reconsideration, targeting the district court's grant of IBP's motion for summary judgment on their separate Washington Administrative Code § 296-126-092 (1999) rest-break claim. Citing the Washington Court of Appeals' location of an implied cause of action for such claims in *Wingert v. Yellow Freight Systems, Inc.*, 104 Wash.App. 583, 13 P.3d 677 (2001), *aff'd*, 146 Wash.2d 841, 50 P.3d 256 (2002), the district court granted plaintiffs' motion to reconsider and reversed its prior implied right of action decision.

Soon thereafter, the district court conducted a hearing on trial objections, and, weeks later, the district court memorialized its myriad conclusions in another multi-part order. In pertinent part, the district court permitted plaintiffs to recover pay on their state meal-break claim for each minute of break

time lost up to ten minutes, granting a full thirty-minute award to those losing any more than ten minutes; endeavored to calculate damages along the narrowest and most accurate job categories possible; found plaintiffs' trial testimony adequate to establish what equipment in addition to IBP's job-specific lists was "integral and indispensable" to particular job classifications; and, for most Pasco employees, declared the first "compensable activity" to be the donning of protective gear and the last compensable activity to be the doffing of that gear, thus including in the district court's aggregate "compensable" period time spent walking to and from locker room and work station, time spent donning and doffing gear in order to comply with IBP's meal and rest-break exit and entry requirements, and time devoted to waiting for, preparing, handling, replacing, and washing "compensable" equipment.

To similar effect, on September 14, 2001, the district court issued thorough findings of fact and conclusions of law. On plaintiffs' federal law claims, the district court applied 29 U.S.C. § 255(a)'s three-year statute of limitations, also finding that the representative evidence adduced by the plaintiffs adequately and accurately supported a damage award for all plaintiffs, notwithstanding somewhat discrepant job-specific donning and doffing rates, and concluding that FLSA required compensation[6] for all of plaintiffs' work time—e.g., donning, doffing, and cleaning of "integral and indispensable" protective gear; waiting and some walking time during the workday—both during pre-shift and post-shift times and during the thirty-minute meal-break.

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[6] In contrast, as non-compensable "work," the district court listed donning and doffing of non-protective gear (e.g., hard-hats, frocks, ear plugs, safety goggles, and hair nets as non-protective gear), finding it concomitantly less-than-integral to the job and demanding of only *de minimis* time.

On plaintiffs' state law claims, the district court again rejected IBP's preemption theses, determining IBP to have infringed plaintiffs' right to be paid for all hours worked under Revised Washington Code §§ 49.46.020 and 49.46.030 (1999), and finding IBP to have violated plaintiffs' state law rights vis-a-vis meal-break time and second rest-break time, paralleling FLSA in assigning damages for the state meal-break claim.

The district court also rejected IBP's state-law and FLSA-based defenses. On the former, the district court determined that the Washington Supreme Court's decision in *Inniss v. Tandy Corp.*, 141 Wash.2d 517, 7 P.3d 807 (2000) (En Banc), did not mandate adoption of the workweek standard as a matter of state law for hourly employees. On the latter, the district court found that 29 U.S.C. § 203(*o*) (1999), which excludes "clothes changing" and "washing" time from compensable time when these activities are the subject of collective bargaining, offered IBP no relief because § 203(*o*)'s "changing clothes" and "washing" exclusions did not reach donning, doffing, and cleaning of specifically protective, non-clothing-like gear; that IBP lacked "good faith"; and that the Portal-to-Portal Act did not operate to plaintiffs' disadvantage because the donning, doffing, and cleaning of protective gear was "integral and indispensable" to their jobs, fulfilling mutual obligations of employer and employee. Walking and waiting time, the district court continued, occurred during the principal workday and was thus compensable.

For IBP's FLSA and state-law violations, the district court awarded plaintiffs liquidated damages, a measure of "double" (i.e., exemplary) damages with regard to plaintiffs' state meal-break claims, and prejudgment interest. Over the next few months, the district court denied plaintiffs' motion for injunctive relief, conducted a hearing on plaintiffs' motion for fees and sanctions, and memorialized its fee hearing decisions

in a thoroughgoing Order.[7] In its fee Order, the district court denied IBP's Federal Rules of Civil Procedure 52 and 59 motions and denied plaintiffs' motion to strike certain aspects of the record. Both IBP and plaintiffs filed timely notices of appeal. We have jurisdiction under 28 U.S.C. § 1291.

II

It is axiomatic, under the FLSA, that employers must pay employees for all "hours worked." *See* 29 U.S.C. §§ 206, 207 (1999); *Turner v. City of Philadelphia,* 262 F.3d 222, 224 (3d Cir.2001). The threshold question in this case is whether the activities cited by the plaintiffs—donning and doffing, waiting and walking—constitute "work" under the FLSA. We agree with the district court that, under the facts presented by this case, they do.

"Work," the Supreme Court has long noted, is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *See Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944). Definitionally incorporative, *Muscoda*'s "work" term includes even non-exertional acts. *See Armour & Co. v. Wantock,* 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944) (noting that even "exertion" is not the *sine qua non* of "work" because "an employer . . . may hire a man to do nothing, or to do nothing but wait for something to happen").

Plaintiffs' donning and doffing, as well as the attendant retrieval and waiting, constitute "work" under *Muscoda* and *Armour's* catholic definition: "pursued necessarily and primarily for the benefit of the employer," *Muscoda,* 321 U.S. at 598, 64 S.Ct. 698, these tasks are activity, burdensome or not,

[7] Neither party has challenged any aspect of the district court's fee decision.

performed pursuant to IBP's mandate for IBP's benefit as an employer. 323 U.S. at 133, 65 S.Ct. 165, 321 U.S. at 598, 64 S.Ct. 698. The activities, therefore, constitute "work."

That such activity is "work" as a threshold matter does not mean without more that the activity is necessarily compensable. The Portal-to-Portal Act of 1947 relieves an employer of responsibility for compensating employees for "activities which are preliminary or postliminary to [the] principal activity or activities" of a given job. 29 U.S.C. § 254(a) (1999). Not all "preliminary or postliminary" activities can go uncompensated, however. "[A]ctivities performed either before or after the regular work shift," the Supreme Court has noted, are compensable "if those activities are an integral and indispensable part of the principal activities." *Steiner v. Mitchell,* 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956); *see also Mitchell v. King Packing Co.,* 350 U.S. 260, 261, 76 S.Ct. 337, 100 L.Ed. 282 (1956); 29 C.F.R. § 790.7(h) (1999) ("[A]n activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions.").

The Supreme Court's approach to this "principal," "integral and indispensable" duty question is context-specific. To be "integral and indispensable," an activity must be necessary to the principal work performed and done for the benefit of the employer. *See Barrentine v. Arkansas-Best Freight Sys., Inc.,* 750 F.2d 47, 50 (8th Cir.1984), *cert. denied,* 471 U.S. 1054, 105 S.Ct. 2116, 85 L.Ed.2d 480 (1985); *Dunlop v. City Elec., Inc.,* 527 F.2d 394, 398 (5th Cir.1976). Plaintiffs' donning and doffing of job-related protective gear satisfies *Steiner*'s bipartite "integral and indispensable" test.

First, because the donning and doffing of this gear on the Pasco plant's "premises is required by law, by rules of [IBP], [and] by the nature of the work," *see* 29 C.F.R. § 790.8(c) n.65 (1999), this donning and doffing is "necessary" to the

"principal" work performed. From sanitary aprons to metal-mesh gear, IBP "by rule[ ]," *id.*, mandates the donning and doffing of clothes and gear at various intervals throughout the workday, requiring employees to wait for and to retrieve that gear in particular areas at particular times on the Pasco plant's premises. *See Steiner,* 350 U.S. at 256, 76 S.Ct. 330. United States Department of Agriculture sanitation standards and Occupational Safety and Health Administration (hereinafter "OSHA") industry standards bolster this "by rule" conclusion, demanding maintenance of sanitary conditions, 9 C.F.R. § 308.3, and the provision of protective equipment at the Pasco plant "wherever[ ][ ] necessary by reason of hazards or processes of [work] environment." 29 C.F.R. § 1910.132(a) (1999).

Second, it is beyond cavil that the donning, doffing, washing, and retrieving of protective gear is, at both broad and basic levels, done for the benefit of IBP. *See generally United Transp. Union Local 1745 v. City of Albuquerque,* 178 F.3d 1109, 1116 (10th Cir.1999). These plaintiff-performed activities allow IBP to satisfy its requirements under the law, *see* 9 C.F.R. § 308.3 (1999); 29 C.F.R. § 1910.132(a) (1999), and these activities prevent unnecessary workplace injury and contamination, both of which would inevitably impede IBP's "disassembly" process. Under *Steiner,* plaintiffs' donning, doffing, and cleaning activities are "integral and indispensable" to Pasco's "principal" activity.

This "integral and indispensable" conclusion extends to donning, doffing, and cleaning of non-unique gear (e.g., hardhats) and unique gear (e.g., Kevlar gloves) alike. Little time may be required to don safety glasses and the use of safety goggles is undoubtedly pervasive in industrial work. But ease of donning and ubiquity of use do not make the donning of such equipment any less "integral and indispensable" as that term is defined in *Steiner.* Safety goggles are, like metal-mesh leggings, required by IBP, and

they are, like metal-mesh leggings, necessary to the performance of the principal work. Both are "integral and indispensable" under *Steiner*'s exception to the Portal-to-Portal Act's bar to compensation of preliminary or postliminary activity.

However, we agree with the district court's alternative conclusion as to why the time spent donning and doffing non-unique protective gear such as hardhats and safety goggles is not compensable: The time it takes to perform these tasks vis-a-vis non-unique protective gear is *de minimis* as a matter of law. "As a general rule," we have noted, "employees cannot recover for otherwise compensable time if it is *de minimis.*" *Lindow v. United States,* 738 F.2d 1057, 1061-62 (9th Cir.1984). "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours," the Supreme Court has observed, "such trifles may be disregarded[, for] [s]plit-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA]." *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). As the Tenth Circuit posited in an alternative conclusion in *Reich,* time spent donning and doffing non-unique protective gear, "although essential to the job[ ] and required by the employer," is at once so insubstantial and so difficult to monitor that it "is *de minimis* as a matter of law." 38 F.3d at 1126 & n. 1.

We agree with this conclusion, both as a matter of logic and as a matter of law. While we do not suggest that the donning of such gear is "trifl[ing]," *see Mt. Clemens,* 328 U.S. at 692, 66 S.Ct. 1187, we do believe that neither FLSA policy nor "the actualities" of plaintiffs' working conditions justify compensation for the time spent performing these tasks. Accordingly, donning and doffing of all protective gear is integral and indispensable to "the principal activities for which [the plaintiffs] are employed," *Steiner,* 350 U.S. at

256, 76 S.Ct. 330, and generally compensable. However, the specific tasks of donning and doffing of non-unique protective gear such as hardhats and safety goggles is noncompensable as *de minimis*. *Lindow,* 738 F.2d at 1061.

In sum, we agree with the district court's conclusion, but for different reasons in part. In this context, "donning and doffing" and "waiting and walking" constitute compensable work activities except for the *de minimis* time associated with the donning and doffing of non-unique protective gear.

III

The FLSA contains an exception for "any time spent in changing clothes" that was excluded from compensation under "the express terms of or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(*o*) (1999) (hereinafter "§ 3(*o*)"). IBP argues that, even if compensable in a general sense, the time employees spend donning and doffing protective gear is non-compensable under the "changing clothes or washing" exclusion.

Section 3(*o*) reads in pertinent part:

> *Hours Worked.*—In determining for the purposes of sections 206 and 207 . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Id.

Distilled to its essence, this case requires us to decide whether putting on and taking off protective gear constitutes "changing clothes" as that phrase is used in the statute. Neither § 3(*o*) nor its legislative history defines the phrase,

and no case law assesses the precise question we address here. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200, 203 (5th Cir.1999) (noting that plaintiffs raised a similar § 3(*o*) safety gear claim but not reaching the issue). In light of this doctrinal, statutory, and legislative lacunae, we give the relevant language its "ordinary, contemporary, common meaning." *United States v. Akintobi,* 159 F.3d 401, 403 (9th Cir.1998) (internal quotation marks omitted) (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)).

The parties posit various dictionary definitions and regulatory references, mostly confined to discussing the etymology of the word "clothes" and, in particular, its commonly understood meaning during the year in which § 3(*o*) was adopted. IBP argues that "clothes" must mean "whatever is worn as covering for the human body," citing *Webster's New International Dictionary of the English Language* 507 (2d ed. unabridged 1939). IBP's construction would embrace any conceivable matter that might adorn the human body, including metal-mesh leggings, armor, spacesuits, riot gear, or mascot costumes. Citing the same dictionary source, plaintiffs contend that the meaning of the word is limited to covering worn "for decency or comfort." *Id.*

Viewed in statutory context, it is evident that the phrase "changing clothes" was not employed in the expansive fashion urged by IBP. First, FLSA exemptions, the Supreme Court has long counseled, "are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960) (citing *Mitchell v. Kentucky Fin. Co.,* 359 U.S. 290, 295, 79 S.Ct. 756, 3 L.Ed.2d 815 (1959)); *see also Auer v. Robbins,* 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Following the Supreme Court's lead, we have also read FLSA exemptions—such as § 3(*o*)—tightly, refusing to

apply FLSA exemptions "except [in contexts] *plainly and unmistakably* within the[ ] [given exemption's] terms and spirit." *Klem v. County of Santa Clara,* 208 F.3d 1085, 1089 (9th Cir.2000) (internal punctuation omitted; emphasis added); *see also Do v. Ocean Peace, Inc.,* 279 F.3d 688, 691 (9th Cir.2002); *Dole v. W. Extension Irr. Dist.,* 909 F.2d 349, 351 (9th Cir.1990). The protective gear at issue does not "plainly and unmistakably" fit within § 3(*o*)'s "clothing" term. Absent such a plain and clear § 3(*o*) fit, *Arnold* requires that we construe § 3(*o*)'s against the employer seeking to assert it. 361 U.S. at 392, 80 S.Ct. 453. Thus, the exemption must be construed against IBP.

Second, and perhaps more importantly, specialized protective gear is different in kind from typical clothing. The admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit. Rather, personal protective equipment generally refers to materials worn by an individual to provide a barrier against exposure to workplace hazards. OSHA has recognized the difference in its regulations defining "personal protective equipment":

> Personal Protective Equipment is specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (e.g. uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment.

29 C.F.R. § 1910.1030(b) (1999).

Of course, this OSHA definition was promulgated in a different context. Nonetheless, it provides a useful analytic distinction.[8] It also underscores the fact that, from both a

[8] In the context of § 3(*o*), the distinction makes particular sense because the section makes the time spent "changing clothes" the proper subject of collective bargaining, whereas it would not be in the interest of public policy to allow disincentives for employers and employees to use government-mandated personal protective equipment.

regulatory and common sense perspective, "changing clothes" means something different from "donning required specialized personal protective equipment." In short, the district court correctly interpreted the "changing clothes" exception in § 3(*o*) as not including the time spent putting on personal protective equipment.[9]

IV

IBP also disputes the district court's view of the compensable work day. It claims that the district court erred in determining that the compensable work day began with the first act of compensable work. Specifically, IBP argues that workers should not be paid for the time spent walking to and from the Pasco plant stations after donning personal protective equipment. Under § 4 of the Portal-to-Portal Act, employees receive compensation only for "hours worked," i.e., for work occurring during the "workday." 29 U.S.C. § 254(a) (1999); *see also* S.Rep. No. 80-48, at 48 (1947) (defining "workday" as the period "between the commence-

[9] Appearing as an *amicus curiae,* the United States Secretary of Labor generally agrees with IBP's definition of the "changing clothes" term, asserting that this phrase covers the donning and doffing of the protective gear we address here. In a June 2002 opinion letter, in fact, the administrator of the Department of Labor's Wage and Hour Division stated that § 3(*o*)'s clothing term "includes the protective safety equipment typically worn by meat packing employees." This position directly conflicts with a 1997 opinion letter from the same Division, in which the administrator concluded that the "plain meaning of 'clothes' in section 3(*o*) does not encompass protective safety equipment." A January 15, 2001, letter reaffirmed the 1997 letter's conclusion. As the Supreme Court has directed, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), and we reject the Secretary's new, inconsistent interpretation here.

ment . . . and the termination . . . of the principal activity . . . which such employee was employed to perform"); 29 C.F.R. § 790.6(b) (1999) (noting that the "workday" includes "all time within that period whether or not the employee engages in work throughout all of that period"); *cf. id.* §§ 785.16(a), 785.19 (1999). Under § 4, employees have no right to receive overtime compensation for activities that are "preliminary to or postliminary to [a job's] principal activity or activities," 29 U.S.C. § 254(a) (1999), unless those preliminary or postliminary activities are "integral and indispensable [to][ ] the principal activities for which [the employees] are employed." *Steiner,* 350 U.S. at 256, 76 S.Ct. 330; 29 U.S.C. § 254(a) (1999).

The district court properly reasoned that the workday commenced with the performance of a preliminary activity that was "integral and indispensable" to the work, and the district court also properly determined that any activity occurring thereafter in the scope and course of employment was compensable. Thus, the district court included "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment" in its "compensable" time measure.

Steiner compels this conclusion. *Steiner's* "principal activity" term expressly "embraces all activities . . . integral and indispensable" thereto, preliminary or otherwise, 350 U.S. at 252-53, 76 S.Ct. 330 (internal quotation marks omitted); the retrieval and donning of protective equipment are "integral and indispensable" preliminary activities, and, as such, are "embrace[d]" by plaintiffs' "principal [work] activity." *Id.* All activities performed thereafter—such as "walking"—thus occur during the "principal" workday and are compensable. *Id.; see also* 29 C.F.R. § 790.6(b) (1999).

IBP contends that § 254(a)(1) is a "stand alone" provision excluding from compensability any and all "walking, riding,

or traveling to and from the actual place of performance of the principal activity" without regard for the "principal activity" itself. 29 U.S.C. § 254(a)(1) (1999). However, *Steiner* eschews such a construction and directs us to "embrace" within the "principal activity" all "integral and indispensable" activities thereto. 350 U.S. at 252-53, 76 S.Ct. 330. There is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done.[10] Plaintiffs were required to obtain their protective gear from their lockers and to be present at their work stations as the first piece of meat arrived; they obviously could not have worked without walking between these places. The district court correctly held that Pasco plant work time was continuous, not the sum of discrete periods.

V

IBP contends that it is shielded from liability by FLSA's good faith defense provisions. *See* 29 U.S.C. §§ 259, 260 (1999). One of these provisions, § 259, "was designed to protect employers from liability if they took certain actions on the basis of an interpretation of the law by a government agency, even if the agency's interpretation later turned out to be wrong." *EEOC v. Home Ins. Co.,* 672 F.2d 252, 263 (2d Cir.1982). In pertinent part, § 259 reads:

> [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the [FLSA] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative

[10] *But see Tum v. Barber Foods, Inc.,* 331 F.3d 1 (1st Cir.2003) (holding under the facts of that case that such activity was not compensable as part of the workday).

> regulation, order, ruling, approval, or interpretation, of [the relevant USDOL administrator], or any administrative practice or enforcement policy of such agency. . . .

29 U.S.C. § 259(a) (1999).

To be insulated from liability under § 259's good faith exception, an employer must "show it acted in (1) good faith, (2) conformity with, and (3) reliance on the DOL's regulations or the Administrator's Opinion Letter." *Frank v. McQuigg,* 950 F.2d 590, 598 (9th Cir.1991). This test has both objective and subjective components, asking how a "reasonably prudent [person] would have acted under the same or similar circumstances" and requiring "that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry." *Id.* (quoting 29 C.F.R. § 790.15(a) (1900)) (internal punctuation omitted). Section 259's test also places on employers "an affirmative duty to inquire about uncertain [FLSA] coverage issues," *see Keeley v. Loomis Fargo & Co.,* 183 F.3d 257, 271 (3d Cir.1999) (citing 29 C.F.R. § 790.15(b)), putting "the risk of a close [good faith] case on the employer." *Reich,* 38 F.3d at 1127; *see also* 29 C.F.R. § 790.15(d) n. 99 (1999) ("It is not intended that this [good faith] defense [ ] apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him.") (quoting 93 Cong. Rec. 4390 (1947)). The employer bears the burden of proof to establish this exception.

IBP argues that its position (1) was supported by the USDOL's 1990s litigation strategy because that litigation focused on non-unionized plants and, in so focusing, demonstrated an administrative practice and enforcement policy treating unionized plants as exempt from such litigation under § 3(*o*), and (2) is bolstered by the supposed good faith it demonstrated in studying and implementing a four-minute compliance plan.

The good faith provisions of § 259 do not embrace IBP's conduct. To come within the exception's reach, an employer's acts "must have been taken in reliance on [an] administrative ruling or interpretation." *Home Ins. Co.,* 672 F.2d at 264. By their plain terms, court decisions, agency litigation positions and self-initiated activities are not "administrative rulings or interpretations." The only agency action upon which IBP relies is the enforcement policy putatively evident in the USDOL's 1990s litigation strategy. Despite IBP's contentions to the contrary, however, *Reich* expressed no opinion regarding the § 3(*o*) "clothing" issue, and, in *Reich,* the Tenth Circuit even hinted that IBP's broad "clothing" definition is untenable. 38 F.3d at 1127. As the district court rightly noted, the *Reich* litigation provided IBP "nothing upon which to rely other than its assumptions about what clothes changing and washing were including under 3(*o*)."

As a rule, moreover, litigating positions are regarded quite differently in the law than an "administrative ruling or interpretation." *See, e.g., Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs,* 151 F.3d 1162, 1165 (9th Cir.1998). There is a sound basis for the distinction. As the Supreme Court has explained, "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Inst. v. Camp,* 401 U.S. 617, 628, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). Administrative agency constructions of governing statutes are the product of deliberation and analysis by the entity charged with application of the statute. Agency positions developed in litigation, by contrast, are not of the same character: they are specifically tailored to help obtain a favorable outcome in a pending controversy in which the agency is involved. Concessions or settlements within the course of the administrative litigation also may be made for a

variety of quite justifiable reasons; however, the contextual underpinnings are dissimilar from agency rule-making.

IBP's four-minute compliance plan, moreover, merely embodies an effort to overcome a settlement impasse in a non-§ 3(*o*) context, offering no conclusion regarding IBP's supposed § 3(*o*) defense or its otherwise FLSA-violative conduct. Under the facts presented by this case, the district court did not err in rejecting IBP's good faith theory.

VI

If a particular employer's conduct embodies "willful violation" of FLSA, 29 U.S.C. § 255(a) permits extension of the FLSA's standard two-year statute of limitations to a three-year period. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); *see* 29 U.S.C. § 255(a) (1999). The determination of willfulness is a mixed question of law and fact, *see Reich v. Monfort,* 144 F.3d 1329, 1334 (10th Cir.1998), and we review mixed questions *de novo* and the factual findings underpinning the determination for clear error. *See Rios v. Rocha,* 299 F.3d 796, 799 n. 4 (2002). The district court did not err in applying § 255's three-year statute of limitations to plaintiffs' FLSA claims. *Cf. Reich v. Monfort,* 144 F.3d at 1334-35.

For § 255's extension to obtain, an employer need not knowingly have violated the FLSA; rather, the three-year term can apply where an employer disregarded the very "possibility" that it was violating the statute, *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141 (2d Cir.1999), although we will not presume that conduct was willful in the absence of evidence. *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 356 (5th Cir.1990).

To prove a particular FLSA violation willful under § 255, the Supreme Court has, in general, required evidence of an employer's "kn[owing] or [ ] reckless disregard for the matter of whether its conduct was prohibited by the statute."

Richland Shoe, 486 U.S. at 133, 108 S.Ct. 1677 (citing *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125-30, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985)). We agree with the district court and conclude that "the proof demonstrate[s] [that IBP] recklessly disregarded *the possibility* that [it] was violating the FLSA." *Herman,* 172 F.3d at 141 (emphasis added).

An examination of the record verifies the propriety of the district court's conclusion. IBP was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them. To the contrary, IBP's actions may more properly be characterized as attempts to evade compliance, or to minimize the actions necessary to achieve compliance.[11] IBP "could easily have inquired into" the meaning of the relevant FLSA terms and the type of steps necessary to comply therewith. *Herman,* 172 F.3d at 142. It failed to do so. The district court appropriately applied § 255's three-year statute of limitations to IBP's willful conduct.

VII

The district court did not err in awarding liquidated damages under the FLSA, a decision we review for abuse of discretion. *See Local 246 Util. Workers Union v. S. Cal. Edison Co.,* 83 F.3d 292, 298 (9th Cir.1996). For violations of the FLSA's minimum and overtime wage provisions, employers "shall be liable to the . . . employees affected in the amount of . . . overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1999); *see Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 583-84, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) (observing that FLSA liquidated damages are not

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[11] Contrary to IBP's assertion, *Service Employees International Union Local 102 v. County of San Diego,* 60 F.3d 1346 (9th Cir.1994), is inapposite because the record in that case did not reflect any knowing or reckless conduct.

penalties exacted by law, but, rather, compensation to the employee occasioned by the delay in receiving wages due). Under 29 U.S.C. § 260, courts need not award liquidated damages in every instance; instead, courts retain discretion to withhold a liquidated damages award, or to award less than the statutory liquidated damages total, where an employer shows that, "despite the failure to pay appropriate wages, the employer acted in subjective 'good faith' and had objectively 'reasonable grounds' for believing that the acts or omissions giving rise to the failure did not violate the FLSA." *Herman,* 172 F.3d at 142; *see* 29 C.F.R. § 790.17(i) n.110 (1999) (observing that an employer's inability to satisfy § 259 does not preclude a court from finding that the employer met § 260's terms).[12]

To satisfy § 260, a FLSA-liable employer bears the "difficult" burden of proving both subjective good faith and objective reasonableness, "with double damages being the norm and single damages the exception." *Herman,* 172 F.3d at 142 (citing *Reich v. S. New Eng. Telecomm. Corp.,* 121 F.3d 58, 71 (2d Cir.1997)); *see also Dole v. Elliott Travel & Tours,* 942 F.2d 962, 968 (6th Cir.1991). Where the employer "fails to carry that burden," we have noted, "liquidated damages are mandatory." *Local 246,* 83 F.3d at 297 (citations omitted).

IBP "failed to take the steps necessary to ensure[its] [ ] practices complied with [FLSA]." *Herman,* 172 F.3d at 142.

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[12] Section 260 provides in relevant part:

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the [FLSA], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof. . . .

29 U.S.C. § 260 (1999).

Mistaking ex post explanation and justification for the necessary affirmative "steps" to ensure compliance, IBP offers no evidence to show that it actively endeavored to ensure such compliance. Instead, it reiterates the value of its read of *Reich,* of USDOL litigation strategy, and of its four-minute compliance plan. IBP's efforts do not constitute evidence of taking the steps necessary to ensure FLSA compliance, and, without such evidence, we cannot say that the district court abused its discretion in awarding liquidated damages. *See Cox,* 919 F.2d at 357 ("[Even] [a] finding that the employer did not act willfully does not preclude an award of liquidated damages.") (citation omitted).

VIII

The district court rejected IBP's contention[13] that it was exempt from the State of Washington's overtime wage provisions[14] because it fell within the "agricultural worker" exemption to those provisions, which provides that the overtime provisions do not apply to:

> individual[s] employed (i) on a farm, in the employ of any person, in connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including rais-

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[13] Plaintiffs contend that IBP has waived this issue by raising it only in a pretrial motion for summary judgment. In generally, we will not review on appeal from a final judgment on the merits issues raised only on summary judgment, *see Locricchio v. Legal Services Corp.,* 833 F.2d 1352, 1359 (9th Cir.1987), but there is an exception to this rule where, as here, judgment was entered after a bench trial and the issue on appeal is one purely of law.

[14] Washington's baseline overtime-wage provision, Wash. Rev.Code § 49.46.130 (1999), reads in pertinent part: "[N]o employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

> ing, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. . . .

Wash. Rev.Code § 49.46.130(2)(g) (1999).

As the district court observed, "[t]his subsection only applies to farm employment, and under no construction could IBP's plant be deemed a farm." However, the district court acknowledged that some of the language in the subsection could be subject to a broader construction. However, given the statutory context, the consistent interpretations of the section by the Washington Department of Labor and Industries ("WDLI"), and Washington case law, the district court concluded that the agricultural exemption did not apply to the Pasco plant workers. Rather, the district court concluded that, for purposes of applying the exemption, "[t]he bright line is when an agricultural product is *first* marketed, *i.e.,* conveyed by someone who raised it, to someone who did not." (Emphasis in district court order). Given the statutory and regulatory context, as well as the principles of statutory construction governing this area of law announced by the Washington Supreme Court, the district court did not err in assessing how the Washington Supreme Court would decide the issue.

Under Washington law, statutory "meaning is [to be] discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wash.2d 1, 43 P.3d 4, 10 (2002) (En Banc). In particular, the Washington Supreme Court has directed courts construing the WMWA to heed the "terms and spirit" of the Act overall and of the individual exemption at issue. *Drinkwitz v. Alliant Techsystems, Inc.,* 140 Wash.2d 291, 996 P.2d 582, 587 (2000). The "spirit" of Washington's labor code is plainly employee-protective. Washington's "long and proud history of being a pioneer in the protection of employee rights," *id.* at 586, has, through the years, manifest in "a strong policy in favor of payment of wages due employees [and in] a comprehensive [statutory] scheme to ensure [such] payment." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,* 146 Wash.2d 29, 42 P.3d 1265, 1267 (2002) (second alteration in original; internal quotation marks omitted). The "spirit" of Revised Code of Washington § 49.46.130(2)(g), in turn, is substantially narrower than IBP suggests, aiming to exclude from WMWA's protections only those individuals employed in agriculture or horticulture during the relatively short harvest season. As in the FLSA context, we must construe exemptions to the WMWA narrowly such that only contexts "plainly and unmistakably consistent with the terms and spirit of the legislation" fit therein. *Id.* The individual plaintiffs do not "plainly and unmistakably" fall within § 49.46.130(2)(g)'s ambit.

To the extent that the statute contains ambiguity, we agree with the district court that the Washington Supreme Court would likely afford deference to the state agency's interpretation. Under Washington law, deference is owed the state agency interpretation of a state statute that the agency enforces, "if the law being interpreted is within [that] agency's expertise." *Budget Rent A Car Corp. v. Wash. Dep't of Licensing,* 144 Wash.2d 889, 31 P.3d 1174, 1180

(2001) (En Banc). In this case, the district court attached significance to the WDLI policy that the agricultural worker exemption does not apply to employees in commercial processing of any agricultural commodities grown or raised by another. Several WDLI officials testified as to this policy, and a 1997 enforcement letter from WDLI declares that the statutory exemption "should be strictly and narrowly construed to exempt" only workers performing labor "immediately necessary to complete the successful operation of the agricultural/horticultural enterprise." Although this policy interpretation does not bind us, it provides an additional persuasive indication of how the Washington Supreme Court likely would decide the question.

Thus, in view of the principles of statutory construction applicable under Washington law, the district court did not err in determining that the Washington Supreme Court would likely hold that the agricultural exemption is inapplicable to the IBP packing plant employees.[15]

IX

The Washington Minimum Wage Act, like the FLSA, requires employers to compensate employees at, at least, a minimum wage rate. *See* Wash. Rev.Code § 49.46.020 (1999). Some courts have held that, under the FLSA, an employee's right to recover minimum wage accrues each workweek, not by individual hour. *See Dove v. Coupe*, 759 F.2d 167, 172 (D.C.Cir.1985); *see also* 29 U.S.C. § 206(a) (1999) ("Every employer shall pay [a minimum wage] to each of his employees who in any workweek is engaged in

[15] We need not address whether federal law preempts application of Washington state law in this case, for IBP did not properly raise this preemption argument on appeal. *See Devereaux v. Abbey*, 263 F.3d 1070, 1079 (9th Cir.2001) ("As a general matter, '[w]e review only issues which are argued specifically and distinctly in a party's opening brief.'") (citation omitted; alteration in original).

commerce or in the production of goods for commerce. . . ."). We must determine whether the WMWA similarly provides only a right to minimum wages based on a workweek standard or whether, in contrast, employees retain a per-hour right to minimum wage under Washington law.

Washington state courts have yet to determine whether hourly-employees, like plaintiffs, have a per-hour or a work-week right to minimum wage. *See Seattle Prof'l Eng'g Employees Ass'n ("SPEEA") v. Boeing Co.*, 92 Wash.App. 214, 963 P.2d 204, 225 (1998) (expressly refusing to "address whether compliance with the WMWA should be evaluated on an hourly or workweek basis"), *as amended by* 92 Wash.App. 214, 963 P.2d 204 (1998) (same). The district court concluded that Washington courts were "likely" to adopt the per-hour standard for hourly employees. We agree.

The district court relied on three bases for its conclusion. First, the WMWA omits the phrase "in any workweek," which is contained in the relevant portion of the FLSA. Second, the district court drew significance from the fact that, in *SPEEA*, the trial court used a per-hour measure and the Washington Supreme Court refused to criticize this aspect of the trial court's methodology. Third, it deferred to the WDLI interpretation that, for hourly workers, the WDLI employs the per-hour standard for determining minimum wage compliance.

We believe the district court's analysis is persuasive. Regulations interpreting the WMWA are similarly telling in this regard. Repeatedly listing "hourly" employment as a separate employment type, these regulations permit use of the work-week measure only for particular employment categories. *See, e.g.*, Wash. Admin. Code § 296-128-550 (1999); *id.* § 296-126-021 (1999); *id.* § 296-126-010 (1999). Were the Washington legislature disposed to apply the workweek measure to hourly employees, it could have done so as expressly as it did vis-a-vis other employment types.

And were the workweek measure to be generally and necessarily applicable, the Washington legislature's specification of the workweek standard for, e.g., commissioned employees would be both extraneous and redundant.

Given this statutory and regulatory background, the district court quite reasonably predicted that the Washington Supreme Court would construe the WMWA as using a per-hour standard for hourly employees.

X

In unequivocal terms, Wash. Admin. Code § 296-126-092 requires that "[e]mployees shall be allowed a meal period of at least 30 minutes." Wash. Admin. Code § 296-126-092(1) (1999). Such "meal period[s]" are to "commence[ ] no less than two hours nor more than five hours from the beginning of [an employee's] shift," and such meal periods "shall be" on the employer's time—i.e., shall be paid—"when the employee is required by the employer to remain on duty on the premises or at the prescribed work site in the interest of the employer." *Id.*

WDLI, appearing as an *amicus curiae,* asserts that Wash. Admin.Code § 296-126-092 evinces a "clear, 'bright-line' standard": it requires employers to provide meal-breaks of "at least 30 minutes," and it demands that employers interrupting meal-breaks "pay for the entire meal break, regardless of the length and the number of the work-interruptions or curtailments." *Cf. Brennan v. Elmer's Disposal Serv., Inc.,* 510 F.2d 84, 88 (9th Cir.1975) ("An employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work."). The district court construed this provision as compensating a particular employee only for minutes lost if that employee lost less than or as many as ten minutes of his or her meal-break time to work duty, and awarding compensation for the full thirty-minute term only where an employee lost more than ten

minutes of his or her meal-break time to work duty. *Cf.* 29 C.F.R. §§ 785.18 & 785.19 (1999) (permitting employers to reduce meal-breaks to twenty minutes under "special conditions"; specifying the thirty-minute rule as one that need only "ordinarily" be followed); *S. New Eng. Telecomm. Corp.,* 121 F.3d at 63-65 (applying § 785.19 in a "practical manner"); *see also Roy v. County of Lexington,* 141 F.3d 533, 544-45 (4th Cir.1998) (adopting a "predominant benefit" test in assessing meal-break claims under FLSA).

Although perhaps consistent with the FLSA, the district court's interpretation conflicts with the terms of the mandatory language of Wash. Admin. Code § 296-126-092. Unlike the correlative FLSA provisions, which permit truncation of the thirty-minute period in certain contexts, *see* 29 C.F.R. §§ 785.18 & 785.19 (1999), neither Wash. Admin. Code § 296-126-092 nor its interpretative guides permit any mitigation of the section's mandatory thirty-minute duty-free directive. *See* Wash. Admin. Code § 296-126-092(1) (expressly noting that employees "shall be allowed" a thirty-minute meal-break); *see also Wash. State Liquor Control Bd. v. Wash. State Pers. Bd.,* 88 Wash.2d 368, 561 P.2d 195, 200 (1977) (En Banc) ("[A]s a general rule, the use of the word 'shall' in a statute is imperative and operates to create a duty. . . ."). Without reference to or acceptance of the kind of "special circumstances" posited in 29 C.F.R. § 785.19, Wash. Admin. Code § 296-126-092(1) requires "a meal period of at least 30 minutes." *Id.* No intrusions on this thirty-minute period are condoned or even acknowledged; indeed, WDLI's most recent evaluation of this provision notes that "[i]f the meal period should be interrupted due to the employee's performing a task . . . [t]he entire meal period must be paid without regard to the number of interruptions." Wash. State Dep't of Labor and Indus., Administrative Policy ES.C.6 (2002), *available at http://www.lni.wa.gov/scs/workstandards/policies /esc6.htm.*

The plain words of the statute buttress WDLI's interpretation, and we owe WDLI's construction deference under Washington law. *Wash. State Liquor Control Bd.*, 561 P.2d at 200 ("The construction of a rule by the agency which promulgated it is entitled to great weight."); *Drinkwitz*, 996 P.2d at 591 (discussing Washington's "long and proud history of being a pioneer in the protection of employee rights"). Under Wash. Admin. Code § 296-126-092, plaintiffs are owed compensation for the full thirty-minute period where IBP has intruded upon or infringed the mandatory thirty-minute term to any extent. We thus reverse the district court's decision to bifurcate its Wash. Admin. Code § 296-126-092 award, and we remand for recalculation of damages consistent with this full thirty-minute remuneration approach.

XI

As the Supreme Court noted in *Mt. Clemens*, a court may "award damages to [an] employee, even though the [award] be only approximate." 328 U.S. at 688, 66 S.Ct. 1187. Heeding *Mt. Clemens* "approximate" term, the Tenth Circuit, in *Reich*, affirmed a damage award based on "reasonable time" measures where "differences in personal routines occurred at the end of [a] shift." 38 F.3d at 1127.

Charting a similar course, the district court attached "the compensable time for each activity [ ] [to] the basis of a reasonable time, rather than the actual time required for each activity." The use of reasonable time in this instance was within the district court's discretion. *Mt. Clemens*, 328 U.S. at 687-88, 66 S.Ct. 1187; *see Reich*, 38 F.3d at 1127; *Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 420 (5th Cir.1975).

First, we respectfully disagree with the plaintiffs' read of the district court's damage and time analyses. The district court did not make "actual" time findings only to disregard them, and district court did not rely on a misconception of the concept of "work." We do not disagree with plaintiffs, of

course, that the definition of "work" is not fixed, in most instances, to an objective measure of "reasonableness." *See Brock v. City of Cincinnati*, 236 F.3d 793, 802-03 (6th Cir.2001); *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 522-24 (2d Cir.1998). But we cannot agree with the plaintiffs' use of this thesis here. In arguing that the district court misunderstood "work," plaintiffs conflate a determination that a "reasonable" time sufficed for damage calculation where myriad internal "differences" permeated a class-wide award with a determination that a specific plaintiff's "work" was not itself "reasonable." The district court made the former, but it did not make the latter; that is, the district court did not conclude that any particular plaintiff's "work" was unreasonable or inherently non-compensable. *Cf. Holzapfel*, 145 F.3d at 524. Rather, the district court adopted—as the Tenth Circuit did in *Reich*—a compensation measure based on a "reasonable" quantification of plaintiffs' work time, thereby avoiding countless individual plaintiff-specific quagmires while directing the parties to individualize the damage measure to the extent possible nevertheless.

Second, the district court's approach is consistent with our settled case law. We have approved "approximate[d]" awards where plaintiffs can establish, to an imperfect degree of certainty, that they "ha[ve] performed work and ha[ve] not been paid in accordance with the [FLSA]." *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir.1986) (internal quotation marks omitted; final alteration in original). In such instances, "[t]he only uncertainty is the *amount* of damage," not the fact that damages are due. *Id.* Where an "approximate [ ] award based on reasonable inferences" forms a satisfactory surrogate for unquantified and unrecorded "actual" times, an approximated award is permissible. *Id.* at 1449. The district court's compensation framework adheres to this test.

We recognize, of course, that approximated time and reasonable time are not synonymous categories. As the

courts in *Holzapfel* and *Brock* suggest, in certain contexts, "individual traits and needs of [each employee] [may] preclude any easy determination as to what is a 'reasonable time.'" *Holzapfel,* 145 F.3d at 526; *see Brock,* 236 F.3d at 802. In contexts in which work tasks are not uniform and are less subject to dilatoriness, that which is "approximate" may not always be "reasonable." But the nature of the work at issue in this case, and, notably, the relatively uniform tasks performed by plaintiffs, conduce to the kind of analysis performed by the district court, and the district court did not abuse its discretion in its damage calculation.

XII

IBP contends that the district court erred in holding that there was an implied cause of action for violation of Wash. Admin. Code § 296-126-092 in Wash. Rev.Code § 49.12 (1999). However, after briefing of this appeal, the Washington Supreme Court held that an implied private right of action did exist under the statute, thus foreclosing this argument. *See Wingert,* 50 P.3d at 261.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the judgment of the district court. We remand for recalculation of damages. Each party to bear their own costs.

AFFIRMED in part; REVERSED in part; REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed Sep 14, 2001]

No. CT-98-5005-RHW

GABRIEL ALVAREZ, *et. al.,*
Plaintiffs,

v.

IBP, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial to the bench commenced on September 27, 2000 and concluded on October 27, 2000. A hearing on objections to the Court's proposed findings and conclusions was held on July 27, 2001. An order on objections was issued on August 2, 2001. A hearing on the rest break claim was held August 29, 2001. Throughout this action, Plaintiffs were represented by William Rutzick, Kathryn Goater, and David Mark; Defendant by Douglas Smith, Barbara Duffy, Nancy Anderson, and Sarah Haushild. This constitutes the Court's final findings and conclusions required by Federal Rule of Civil Procedure 52(a).

BACKGROUND

This is a class action brought under the Fair Labor Standards Act ("FLSA") and related Washington state laws by production line workers at IBP's Pasco, Washington plant seeking compensation for unpaid activities prior to the arrival of the first piece of meat, during the unpaid "30-minute" meal break, and after the last piece of meat.

A. The Pasco Plant

IBP owns and operates a beef slaughter and processing plant in Pasco, Washington ("the Pasco Plant"). The class members engaged in production line work in two different sections of IBP's Pasco Plant: the Slaughter and Processing divisions. Cattle are slaughtered and processed into carcasses and other products while moving along a series of consecutive chains in the Slaughter Division. After that, the carcasses are stored in a cooler for at least 24 hours, then wend their way along a chain and moving belts through the Processing Division, where they are further processed. Each worker on the processing line typically performs one or two discrete operations in a disassembly line process.

The Slaughter Division runs one shift beginning operations at 6:30 a.m. A standard slaughter division crew is approximately 178 employees, with approximately 113 job classifications[1]. The Processing Division runs an A shift that starts at 5:45 a.m., and a B shift that starts at 3:15 p.m. These shifts have a combined crew of approximately 800 line workers, with approximately 145 job classifications. On the processing line there are eight processing belts, each dropping carcasses onto a line. Each line is a separate department, with 25-40 employees working side by side. At the end of each line are two to five packaging department employees, who bag pieces of meat. There also are two departments located on the side of the processing floor: the hamburger department and the bones department.

B. Gang Time Pay

Employees at the Pasco plant are paid on a gang time basis, which means pay is based on the time that employees are

[1] The job classifications focus on the particular cut the employee makes. Many classifications are staffed with multiple workers, and workers who work alongside each other on the same line, using virtually the same equipment, will have different classifications.

cutting and bagging meat. Pay begins with the first piece of meat and ends with the last piece of meat. IBP posts the scheduled start of the shift. However, it does not post the times that workers are required to be at their specific lines and work locations, which vary depending on the work location. IBP superintendents did not know what times employees were required to be at specific work locations. Employees expressed confusion about start times. Employees clock-in and out using a swipe card at the beginning and end of each day. The system records the clock-in and out times, but these are not used to determine pay.

Since October 1995, slaughter division employees have been eligible for "sunshine pay" for the "time by which a shift's scheduled hours exceed the killout time of the scheduled number of head." Sunshine pay "is possible where downtime is minimized during the shift and/or where chain speed is increased." (Exhibit 73a.) Sunshine pay is extra compensation for working more efficiently and more quickly.

C. Bargaining History

The majority of the workers at IBP's Pasco plant are Hispanic and are represented by Teamsters Local Union No. 556, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("the Teamsters"), under a series of collective bargaining agreements between the Teamsters and IBP. The 1976 collective bargaining agreement between Local 556 and Columbia Foods included 30 minutes per week for "clothes changing." (Ex 216.) IBP purchased the Pasco operation from Columbia Foods in the late 1970's and a similar provision was included in the first collective bargaining agreement between IBP and Local 556 in 1979. (Ex. 217.) In 1982, "clothes changing" time was removed from the collective bargaining agreement. (Ex. 218.) In 1982, 1986, and 1992, "clothes changing time" was negotiated and left out. In 1999,

clothes changing and clean-up time were negotiated and left out again.

D. DOL Litigation

IBP also operates a number of non-union plants. The United States Department of Labor ("DOL") was involved in ongoing litigation involving 11 of IBP's non-union plants. The courts decided the damages and injunction issues in *Reich v. IBP*, 3 Wage & Hour Cases 2d 324 (D. Kan. 1996); 3 Wage & Hour Cases 2d 863 (D. Kan. 1996). (Ex. 221.) IBP was held liable for 14 minutes per shift back pay to knife users and was permanently enjoined to comply with the FLSA at its non-union plants. The courts also held IBP liable for unpaid pre-shift and post-shift donning, doffing, and cleaning of special packinghouse industry safety equipment and for the time between waiting to pick up and return knives, which were held to be the first and last activities of the work day. *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994).

In December 1997, IBP received a copy of a 29 U.S.C. § 203(o)[2] opinion letter issued by the Administrator of the Wage and Hour Division of the United States Department of Labor. The Administrator concluded that donning and doffing packinghouse protective equipment was not § 3(o) "changing clothes," because this type of equipment was not clothing. He also cited language from the legislative history indicating that Congress intended § 3(o) "washing" to refer to washing the person, not equipment washing. (Ex. 64.) In April 1998, the Department of Labor filed a second suit seeking back pay for

[2] 29 U.S.C. § 203(o) creates an exclusion from compensable time for time "spent in changing clothes or washing at the beginning or end of each work day which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."

post-*Reich* violations at IBP's non-union plants. *Herman v. IBP, Inc.*, 98-CV-2163-JWL (D. Kan.) (Ex 237.) This is when IBP began to pay 4 minutes per day for pre- and post-shift activity at its non-union plants.[3]

Prior to July 1998, IBP scheduled 8-hour shifts, plus a 30-minute unpaid meal break at the Pasco Plant. In July 1998, IBP started paying production line workers 4 minutes of "clothes" time and reduced the shift to 7 hours and 56 minutes. In the fall of 1999, the company reduced the shift to 7 hours and 51 minutes, plus a 30-minute meal break and 4 minutes of "clothes changing time."

E. Pre- and Post-Shift Activities

Employees are required to wear a variety of outer garments and personal protective equipment. IBP documents describe "Minimum Safety Equipment" requirements. (Ex. 90-93.) All employees are required to wear a sanitary outer garment provided by IBP. IBP launders the outer garments each night. All employees are required to use a plastic hard hat, a hair net, and ear plugs. All employees, except those in the slaughter division gutter job, are required to wear either safety glasses or a face shield. The vast majority wear safety glasses. IBP requires employees to clean and store equipment and tools in a company-provided locker at the end of each shift. There are four locker rooms, one each for men and women in the slaughter division and in the processing division. "Knife users" are required to wear a variety of protective equipment for the hands, arms, torsos, and legs. This includes "wire mesh," which is chain-linked metal. Mesh items include aprons, aprons with leggings, vests,

[3] IBP claimed to have reduced the compensable time from 14 minutes to 4 minutes by moving knife distribution and by installing additional equipment washing sinks to reduce waiting time. In late 1998 and early 1999, IBP and DOL negotiated and agreed to 4 minutes of compensation at the non-union plants for pre- and post-shift activities.

sleeves, and gloves. Employees also use puncture-resistant protective sleeves and Kevlar gloves, also referred to as "can't cut" or "Polar" gloves. Knife users also wear plexiglass arm guards on one or both arms. Employees also wear other gloves. In the processing division, employees wear yellow cotton gloves. These gloves facilitate gripping knives or other tools and provide warmth.[4] Some slaughter division employees also wear yellow cotton gloves. Slaughter division employees typically also wear rubber and/or plastic gloves. These facilitate grip and protect against blood and water saturation. Employees also wear liquid repelling sleeves, aprons, and leggings, including yellow plastic sleeves, clear plastic sleeves, clear plastic leggings, and rubber aprons. Saw operators and some packaging employees also wear these items. Employees also wear safety shoes or boots, which must be wiped off or hosed down after each shift. Many employees also wear weight belts to prevent back injuries. Employees also are assigned various equipment; for example, steels are assigned to employees who use knives.

Slaughter employees begin their day by picking up supplies at the supply room, then go to the locker room, where they retrieve their assigned protective equipment, steels, and tools. Most slaughter employees don most of their safety equipment in the locker room. After leaving the locker room, they proceed toward the slaughter floor. Once on the slaughter floor, many go to the knife room to receive sandpaper for sanding steel. There are four or five knife distribution points on the slaughter floor, although some employees pick up knives at the knife room. Knife users sand their steel, and air knife users wipe and wash grease from the air knife prior to using it. Employees are required to be at their work stations and ready to work on the first cow or meat as it arrives.

[4] The processing floor is between 38 and 42 degrees Fahrenheit.

On the processing side, employees must line up to get their frocks and go to the locker room. They obtain safety equipment and tools, which IBP requires be stored in the lockers, and then proceed to the processing floor. Much of the pre-shift routine for processing surrounds the distribution of glove pins with yellow cotton gloves, and protective sleeves and gloves.

Employees receive a 15-minute paid rest break after 2 hours of line operation, and a 30-minute unpaid meal break after approximately another 2 hours of line operation. Breaks begin when employees receive their last piece of meat and end when employees receive their next piece of meat. During the meal breaks, employees must remove certain equipment to go to the cafeteria or to use the restroom. IBP strongly encourages employees to use the restroom during the unpaid meal break and permits such use during work periods only on an emergency basis. Other workers must do the work of the absent worker, making use of the restroom inconvenient for other workers. A majority of employees use the restroom during the meal break. IBP requires employees to remove most equipment prior to entering the restroom.[5] Workers are required to remove outer garments, gloves, scabbards, and chains prior to entering the cafeteria. IBP requires employees to be back at the work station and ready to work on the first piece of meat with their equipment on at the end of the meal break.

After their last piece of meat, workers must clean their equipment and return their equipment to the supply room and to their lockers. There are wash stations located throughout the slaughter floor. Most workers hose down and scrub aprons, sleeves, rubber gloves, and boots. Knife users return the knives to collection boxes. Workers return soiled protec-

[5] Employees do not have to remove hard hats, hairnets, earplugs, safety glasses, and boots to enter the restroom.

tion gloves and sleeves as well as cotton gloves to the supply window. Processing workers clip their soiled gloves and protective sleeves onto their glove pin and return them. Knife users put the knives in buckets that are passed along the production lines. Washable protective equipment and some tools need to be washed at equipment wash sinks, including scabbards, chains, mesh gloves, steels, plastic sleeves, aprons, meat hooks, scissors, and boots.

CLAIMS AND DEFENSES

A. Uncompensated Activities

This case involves unpaid activities prior to the first piece of meat, during the unpaid "30-minute" meal break and second rest break, and after the last piece of meat, under the FLSA, 29 U.S.C. §§ 206 and 207, and the Washington Minimum Wage Act, RCW 49.46.010 *et seq.*, RCW 49.12 *et seq.*, RCW 49.52 *et. seq.*

Most workers begin the work day in the locker room by donning safety equipment. They then engage in a variety of additional activities prior to the start of the paid work day, such as sanding the steel used by knife users to sharpen knives, retrieving cloth gloves, protective gloves, and protective sleeves that are laundered each night, and various other preparatory activities. During the 30-minute unpaid meal break employees are required to doff and hang up the safety equipment they are wearing before they can begin to use the break as their own time. They also are required to don the equipment and be back at their work stations ready to begin cutting meat at the end of the 30-minute break. After working on their last piece of meat, the workers are on the production floor and are required to wash their equipment and doff and store their equipment upon returning to their lockers.

B. Union Negotiations of Clothes Changing Time

IBP urges that 29 U.S.C. § 203(o) permits private negotiations between unions and meat industry employers as to whether to include such pre- and post-shift activities in their employees' paid work time. There was a provision for clothes changing time in the Collective Bargaining Agreement at IBP's Pasco Plant for the year 1976 and for the years 1979-1982, but such a provision was eliminated in 1982 and renegotiated and left out in 1992. IBP argues that it relied on the collective bargaining agreements in effect at the Pasco Plant during the relevant time periods, which excluded clothes changing time, and that those agreements prevent Plaintiffs from asserting these claims, as the Union had bargained away these rights on behalf of the employees.

C. IBP's Reliance on DOL

IBP was involved in litigation with the Department of Labor ("DOL") regarding similar pre- and post-shift activities at its non-union plants. IBP urges that it relied on DOL's exclusion of union plants in this litigation to conclude that clothes changing time was not compensable at union plants. IBP claims it is entitled to this reliance under 29 U.S.C. § 259(a). As a result of this litigation, IBP came to a negotiated settlement with DOL of 4 minutes for clothes changing time at its non-union plants. IBP argues that when the DOL indicated in December 1997 that clothes changing may be compensable at union plants, IBP, although concluding that the DOL was wrong, changed its policy to comply with IBP's 4-minute compensation policy at non-union plants. Starting on July 30, 1998, IBP began to pay its union employees at the Pasco Plant an extra 4 minutes per day compensation for clothes changing.

D. Other Claims Re: Noncompensability

IBP also claims that these pre- and post-shift activities are not compensable under the Portal to Portal Act, 29 U.S.C.

§ 254(a) because they are not integral and indispensable to the employees' performance of their jobs.

IBP argues further that the meal break time is not compensable because it is primarily for the benefit of the employees.

Finally, as to the state law overtime claims, IBP argues that Washington law is to be interpreted consistently with the FLSA and because, they argue, the pre-and post-shift activities are not compensable under the FLSA, they should not be compensable under Washington law. IBP also argues that the Washington Supreme Court's decision in *Inniss* adopts a weekly standard for minimum wage compliance and, therefore, absolves IBP of overtime liability under state law.

DISCUSSION

I. Jurisdiction

The Court has jurisdiction over the class members' FLSA, 29 U.S.C. §§ 201-219, claims under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

The Court has supplemental jurisdiction over the class members' state law claims under the MWA, RCW chapter 49.46, and related exemplary damage claims under RCW chapter 49.52, pursuant to 29 U.S.C. § 1367.

The class members' employment at the Pasco plant has been part of an enterprise engaged in commerce and in the production of goods for commerce, as these terms are used in Sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206-07, and IBP is, therefore, subject to the overtime provisions of 29 U.S.C. § 207.

IBP is an employer for purposes of RCW chapter 49.46 in that it is a corporation acting as an employer in relation to an employee. *See* RCW 49.46.010(4). IBP is, therefore, subject to the requirements of the MWA, RCW chapter 49.46.

II. The Class

The class has been certified as a §16(b) FLSA, 29 U.S.C. § 216, opt-in class, as follows:

> All IBP processing or slaughtering division employees at defendant's Pasco, Washington plant from June 30, 1995 to [August 24, 1999], but specifically excluding all supervisors, managers, quality control employees, guards, mechanics, laundry room employees, janitors, knife room employees, rendering employees, and packing employees who perform work away from the production lines.

Pretrial Order (Ct. Rec. 102).

The Court finds that the hides division is separate from both the processing and slaughter divisions and, therefore, employees working solely in the hides division are not members of this class. Both the superintendent of the kill floor and the superintendent of "A" shift processing testified that hides is a separate division from processing and slaughter. The hides division is located off the kill floor and the processing floor, and hides employees are not allowed to "bid" on jobs in either processing or slaughter. A hides division employee testified that neither the superintendent of processing nor the superintendent of slaughter was his boss and that he does not work in the slaughter area. The class is comprised of 815 slaughter and process division employees, who opted in pursuant to the procedure stipulated to by the parties and approved by the Court. (Ex. 266, 341, 253(a).)

IBP has requested reconsideration of class certification based on the difficulty in calculating damages. Again, this is based on a misunderstanding of the Court's findings, and an attempt to distort the concept of individualized damages. The Court is requiring individualized damages calculations in an over-abundance of caution to the Defendant. The Court could have determined that the evidence was sufficient to permit a

more generalized damages calculation, but because the evidence and testimony permitted a more discrete determination as to timing by job description, equipment list, and activities testified to, the Court determined that this calculation would lead to a recovery that relates to what work was actually performed. Defendant's objection is denied, based on the findings of adequate representative evidence.

III. Representative Evidence

The use of representative evidence is well accepted for determining liability in FLSA cases. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). The Second Circuit explained the principles of representative evidence in *Reich v. Southern New England Telecomms.*, 121 F.3d 58, 66-67 (2nd Cir. 1997) in the following way:

> When a defendant in a suit for lost wages under the FLSA fails to maintain employment records as required by the Act, an employee . . . may submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred.
>
> . . .
>
> . . . In meeting the burden under *Mt. Clemens*, the Secretary need not present testimony from each underpaid employee; rather it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA. *See Reich v. Southern Maryland Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-2 (3d Cir. 1994).

The burden originally is on the employees to demonstrate with sufficient evidence that the employees have, in fact, performed work for which they were improperly compensated, and to produce sufficient evidence to show the amount and extent of that work "as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687. The burden then shifts to the employer, and if the employer fails to produce

"evidence of the precise amount of work performed or evidence to negative the reasonableness of the inference to be drawn from the employee's evidence . . . . [t]he court may then award damages to the employee[s], even though the result be only approximate." *Mt. Clemens*, 328 U.S. at 687-88.

A. IBP's Records Are Inadequate

The representative evidence standard set forth in *Mt. Clemens* applies here since IBP failed to maintain employment records of pre- and post-shift work, as required by the FLSA. *See Southern New England Telecomms.*, 121 F.3d at 66-67. The testimony was that IBP does not require employees to clock-in before donning protective equipment at the beginning of the day or at the end of lunch breaks, and does not have employees wait until after doffing such equipment to clock-out. While employees do clock-in and out, IBP does not use those records to determine hours worked, nor does IBP require when clock-ins or clock-outs occur. Thus, the clock-ins and clock-outs are not an indication of the precise amount of work performed. Some employees clock-in when they arrive at the plant, while some wait until after they get their equipment to clock-in. IBP documents indicate that employees were informed in July 1998 that they are to clock-in "no more than 7 minutes before your scheduled start time," and to clock-out at the "end of your shift as you leave your work area." (Ex. 76.) This policy ensures that the clock-in and clock-out procedures are not an adequate measure of the time employees spend donning and doffing equipment. Thus, the *Mt. Clemens*' precondition to representative evidence is met in this case.

B. Employee Burden

The burden is on the Plaintiffs to demonstrate with sufficient evidence that the employees have, in fact, performed work for which they were improperly compensated,

and to produce sufficient evidence to show the amount and extent of that work, as a matter of just and reasonable inference. *Mt. Clemens*, 328 U.S. at 687. Employee testimony, documentary evidence, and expert testimony are appropriate methods of making a prima facie showing of a pattern or practice of unpaid time and wages. *See Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir. 1983) *cert. denied* 464 U.S. 850 (1983) (holding "plaintiffs met their burden of proof by demonstrating that they performed work and were not compensated . . ." where 13 plaintiffs testified regarding the hours they and members of their families worked and plaintiffs' statistics expert testified and calculated a minimum and maximum number of hours each plaintiff worked.) *See also Reich v. Waldbaum*, 833 F. Supp. 1037, 1042 (S.D.N.Y. 1993) *rev'd on other grounds*, 52 F.3d 35 (2d Cir. 1995); *Herman v. Davis*, 21 F. Supp. 2d 130, 133 (N.D. N.Y. 1998), *rev'd on other grounds*, 196 F.3d 354 (2d Cir. 1999).

Defendants cite *New England Telecomms.* for the proposition that variation among workers and job positions at IBP's Pasco plant requires Plaintiffs to provide testimony from a plaintiff who has been employed in every position. (Ct. Rec. 552.) However, the court in *New England Telecomms.* held that it was "untroubled by the quantum of representative evidence in this case because the testimony covered each clearly defined category of worker; there was actual consistency among those workers' testimony both within each category and overall . . ." *New England Telecomms.*, 121 F.3d at 67. The Court is similarly untroubled here, based on the combination of employee testimony, documentary evidence, and expert testimony. *See also McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (holding that while the testimony of the five employee witnesses was inconsistent in terms of exact days and hours of overtime, they had established "'as a matter of just and reasonable inference' that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays.") (*internal*

citation omitted); *Donovan v. Bel-Loc Diner*, 780 F.2d 1113, 1116 (4th Cir. 1985) (holding that the inconsistency in the pattern or practice does not make the court's factual determination clearly erroneous).

The employee testimony established that pre- and post-shift and meal-time work activities were unpaid, what activities were being performed during these times, and the time each activity takes to complete. Just over 40 employees of IBP's Pasco Plant testified at trial; 25 employees from the Processing Division testified, and employees from the Slaughter Division testified to over 40 job positions. Each employee testified to their various pre- and post-shift activities, as well as their donning and doffing practices during the 30-minute meal break period. While it is true that employees vary in some of the equipment they are required to don and doff, each employee spent some uncompensated time both pre- and post-shift and during the 30-minute meal break. Most employees share at least some of the required protective equipment and the time ranges for pre-shift protective equipment between processing and slaughter are from 30 to 45 minutes in processing, and from 15 to 45 minutes in slaughter.

Furthermore, even if, as Defendant claims, Plaintiffs were required to produce evidence regarding every position at the Pasco plant, the documentary and expert testimony provide the evidence for jobs not testified to by employees. IBP documents identify what jobs at the Pasco plant require protective equipment. (Ex. 74.) Documents also identify jobs for which protective equipment is not required. (Ex. 75.) Internal documents demonstrate which equipment must be removed prior to employees going to lunch or to break. (Exs. 82 and 83.) Other evidence presented indicated what jobs require which items of personal safety equipment. (Exs. 90-93.) Plaintiffs' expert developed average observed times for most activities performed by employees. (Ex. 1035.) Both

IBP's and Plaintiffs' experts performed auditing exercises for certain activities for each position. (Ex. 358-363.)

Plaintiffs' time-study expert, Dr. Kenneth Mericle, also time-studied a variety of pre-shift, post-shift, and meal-break activities based on repeated observation of these activities in 2 days of plant visits and review of 2 days of videotape taken by Plaintiffs in early 1999. Defendant's expert, Dr. Radwin, criticized Dr. Mericle for not making enough observations of each activity to give estimated times to a 95% confidence interval. However, Dr. Mericle made more observations than IBP in its Pasco plant time-study, made more observations than IBP made of most activities in its non-union plant time-studies combined, made more observations than were made in Dr. Radwin's 3-day aborted study, and made more observations than were made for almost every element in the Dr. Fernandez Report. (Ex. 241.) Dr. Mericle's practice with respect to sample size and calculation of confidence intervals is consistent with the practice and experience of the witnesses called by IBP. For example, Jeffrey Fernandez testified about a time-study he had done at two other IBP plants. Many of his reported times did not meet a 95% confidence interval, and he generally obtained fewer observations than did Dr. Mericle. (Trial Exhibit 241.) IBP's own Pasco time-study, performed by Cody Hostick, did not include a confidence interval calculation, and included many fewer observations than did Dr. Mericle's study. While testimony to a 95% confidence interval study would be desirable from an academic standpoint, and would likely be afforded more weight, the Mericle study was sufficiently detailed and consistent with the Radwin study, such that it would be the type of study relied upon in the industry and is entitled to some evidentiary weight herein. The Court finds the study by Dr. Mericle to be reliable.

The combination of this evidence convinces the Court that employees have, in fact, performed work for which they were

improperly compensated, and that they have produced sufficient evidence to show the amount and extent of that work "as a matter of just and reasonable inference."

C. Employer Rebuttal

Once plaintiffs have established that the employees were performing unpaid work and provided evidence as to the extent and amount of the unpaid work, the burden then shifts to the employer to demonstrate the precise amount of work performed or evidence to "negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687-88.

IBP has failed to rebut the Plaintiffs' evidence that they were not paid for the time they spent in pre- and post-shift activities, and in activities during their meal break. The employee manual for IBP states that employees are to find out their correct starting time from their supervisor. (Ex. 1 page 18.) (*See also* testimony of Barb Salter.) The manual also notes that "[w]ork schedules are posted daily on the bulletin board, and it will be the responsibility of each employee to read." (Ex. 1 page 18.) The testimony and evidence were that the employees arrive up to 40 minutes early to retrieve and don their required equipment. (Testimony of Pedro Galvan Juarez, Modesto Reynada, Amir Mustafic.) The swipe card evidence bolsters this claim.

IV. Statute of Limitation

Under the FLSA, the statute of limitation for willful violations is 3 years. 29 U.S.C. § 255(a). A violation is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

IBP's violations herein were willful. In early 1996, IBP was aware of the meal-break issue, based on Kimbro's review

of the Legal Master Narrative Report. (Kimbro; Exhibit 192.) IBP also knew that in *Reich v. IBF*, the court had determined that donning and doffing activity was work when performed pre-shift and post-shift. Kimbro recklessly assumed that employees spent only 1 or 2 minutes in meal-break donning and doffing, based on a fundamental misunderstanding of company policy requiring doffing and donning to use the restroom. IBP also knew or showed reckless disregard of the FLSA in concluding that § 3(o) excluded union plant compensation for activities such as sanding steels, glove pin distribution, cleaning protective equipment, retrieving tools (such as meat hooks and air knives), and the various types of non-clothing pre-shift and post-shift activities commonly performed by class members. Therefore, the court will apply the 3-year FLSA statute of limitation to Plaintiffs' claims.

V. FLSA Claims

A. Overtime Under the FLSA

Plaintiffs are entitled to recover for unpaid work performed in excess of 40 hours a week. Under the FLSA, work for which the employees must be compensated means "mental or physical exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Tennessee Coal, Iron & R.R. v. Muscoda*, 321 U.S. 590, 598 (1944). "Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer . . . " 29 C.F.R. § 785.7 (citing *Armour & Co. v. Wantock*, 323 U.S. 126 (1944) and *Skidmore v. Swift*, 323 U.S. 134 (1994)). An employer is, thus, liable for all work that it permits, *i.e.*, all work of which it has actual or constructive knowledge. *See, e.g., Forrester v. IGA*, 646 F.2d 413, 414 (9th Cir. 1981). An employer is liable for pre-shift work it permits, even though it does not require the employees to arrive prior to the start of the shift. *Lindow v. United States*, 738 F.2d 1057, 1060 (9th Cir. 1984).

The FLSA requires employers to pay employees overtime for hours worked in excess of 40 per week. 29 U.S.C.A. § 207(a). "The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Barrantine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (*citing* 29 U.S.C. § 202(a).) Under the FLSA, an employer must compensate employees at one and one-half time their regular rate of pay for all hours worked in excess of 40 in a week. 29 U.S.C. § 207. For employees paid solely by the hour, their regular rate of pay for overtime purposes is the hourly rate. 29 C.F.R. § 778.110.

B. Compensable Time

The donning, doffing, and cleaning of personal protective equipment is work: it is time employees are required to give their employer at IBP's Pasco plant. *See* 29 C.F.R. § 785.7. Protective equipment also is integral and indispensable to the job, as is evidenced by IBP's lists of required protective equipment and eventual payment of 4 minutes time for clothes changing. For employees required to wait to receive or wash this equipment, this time also is compensable. Waiting time is compensable if an employee is "engaged to wait" and cannot otherwise "use the time effectively for his own purposes." 29 C.F.R. § 785.15. *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Pasco plant employees are required to wait to obtain their gloves and to wash their equipment. This time is compensable.

Walking time is compensable if it occurs after the start of the work day. 29 U.S.C. § 254(a). Walking time is excluded under the Portal to Portal Act only if it occurs "either prior to the time on any particular work day at which such employee commences or subsequent to the time on an particular work

day at which he ceases, such principal activity or activities." *Id.* The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time. 29 C.F.R. § 790.6(b). Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy. The Court acknowledges that there are considerable differences in how and where each employee dons and doffs his or her equipment. Given these differences, the compensable time for each activity is on the basis of a reasonable time, rather than the actual time required for each activity. Evidence of reasonable time was supplied by employee and expert testimony supplied by the Plaintiffs, and not rebutted by IBP. Therefore, the reasonable walking time from the locker to workstation and back, as indicated below, is compensable for employees required to don and doff compensable personal protective equipment stored in their lockers, as is the walking time thereafter, as it occurs during the "work day."

Donning and doffing other, non-unique protective equipment, including and limited to hard hats, earplugs, frocks, safety goggles, a hair net, and boots is also work: it is time required by the employer from the employee, but it is not integral and indispensable to the job.[6] Although the Court disagrees with the court's holding in *Reich, supra*, that these activities are not work, the Court does agree with how the court characterized such activities, "[t]he placement of a pair of safety glasses, a pair of earplugs and a hard hat into or onto

[6] Alternatively, the time it takes to complete such work is de minimis as a matter of law

the appropriate location on the head takes all of a few seconds and requires little or no concentration." 38 F.3d 1123, 1126. Therefore, the time required to don, doff, and clean the non-unique protective equipment is not compensable.

Dr. Mericle estimates that employees spend an average of 9.73 minutes in pre-shift activities and a 5.43 minutes in post-shift activities for a total of 15.16 minutes in pre- and post-shift activities. Dr. Mericle did not include times for various activities in his average time calculations. (Ex. 1035.) His average did not include time for donning and doffing yellow plastic sleeves, clear plastic sleeves, clean-cut gloves, clear plastic leggings, sanding steels, cleaning saws, donning and doffing boots and weight belts, and cleaning or washing knifes. The Court will not adopt Dr. Mericle's average time totals, as the FLSA rights are individual rights and compensation should be administered on an individual basis, and the time required for each job varies with the equipment required. For example, the time required to don equipment can range from 2.497 minutes on line 710B as a flanker, to 5.827 minutes on 710B on lips. (See Ex. 1033 and 1024.)

Plaintiffs' expert, Dr. Mericle, has prepared average times for particular pre- and post-shift and meal-time work activities. Dr. Mericle's times as to these activities are accepted by the Court for three reasons: first, Defendant did not offer an alternative time-study; second, the methodology of Dr. Mericle was followed by the DOL in its time studies involving IBP, and seems to be accepted in the meat packing industry (Test. of Dr. Fernandez and Exs. 241, 103); and, finally, the testimony presented convinces the Court that these times are the reasonable times required for performance of each activity. Employee testimony also supported these times.

The Court finds the following activities are work, and that the following times are the reasonable amount of time required to perform each activity:

Equipment	put on:	take off:
mesh apron	.351[7]	.172
mesh legging apron	.897	.233
scabbard	.264	.172
steel	.186	[8]
mesh glove	.372	.113
polar sleeve	.364	.081
plexiglass arm guard	.091	.047
one mesh sleeve	.307	.095
double mesh sleeve	.473	.170
whites[9]	.578	.126
frock*	.474	.162
rubber apron	.492	.157
yellow plastic sleeve	.171	.071
clear plastic sleeve	.382	.109
rubber glove	.196	.077
clean cut glove	.123	.165
cloth glove	.202	.070

[7] All times are indicated in minutes.

[8] Times not indicated were not measured or presented to the Court.

[9] As to all items marked *, while the Court finds the activity compensable, the time is excluded under 3(o), as it applies to pre- and post-shift duties, but not as it applies to meal-time breaks. See VI.A. *infra*.

Equipment:	put on:	take off:
rubber or safety boot*	.382	.177
weight belt	.279	.173
clear plastic legging	.586	.146
safety glasses*	.076	.073
hard hat*	.134	.101
ear plugs*	.135	
hair net*	.290	
Walking	kill:	process:
walking from locker to work station	.962	1.653
walking to cafeteria to get gloves	1.061[10]	
walking from work station to locker	.962	1.653
walking to cafeteria from work station	1.091	1.352
walking from cafeteria to work station	1.091	1.352
wait and dip scabbard and steel	.179	
Other activities	kill:	process:
wait for wash	.036	.571
wash and clean equipment	1.085	.853

[10] Items not separated between the kill floor and slaughter floor were the same for each floor.

Other activities:	kill:	process:
clean and wash knives	.307	
clean saw	.482	
sand steel	1.829	
wait and obtain gloves	.843	
handle equipment: get ready and put away	.562	
knife sharpening[11]		

In determining that work is occurring pre- and post-shift, the court is aware of the need to view the practical effect of the company's work-place policies. This case involves workers who must do a number of little tasks required by company policy that have significant cumulative effects. Some of the tasks may not be compensable when considered in isolation, but become so when combined with others that are performed contemporaneously. The donning, doffing, cleaning, and storage of required equipment, safety and otherwise, are integral and indispensable to the workers' duties as meat processors. This finding is bolstered by the fact that IBP did decide to pay its union members 4 minutes of clothes-changing time.

The inclusion of compensation for yellow gloves justifies further discussion and illustrates the practical effect of the performance of otherwise small tasks. IBP suggests that the yellow gloves are provided only as a convenience to the workers and, therefore, the effort expended in acquiring, putting on, and taking off the gloves is not work. The testimony of the workers, some supervisors, and the actions of IBP show otherwise.

[11] No testimony was presented as to the length of time it takes to complete this work item.

The workers testified that they could not hold the knives safely without the clean gloves because of the blood and fat that made them slip. Many workers changed their gloves multiple times a day in order to keep them clean. Some had as many as six to eight pairs that they changed throughout the day. In addition to safety concerns, the employees testified that the gloves were necessary as insulation from the cold of the refrigerated carcasses and the cold temperature of the processing floor. Cold hands made it more dangerous to use knives, saws, and other types of cutting equipment. Each employee turned in the dirty gloves to the laundry room at the end of the shift and spent considerable time before shift locating their own set after the gloves were returned from the laundry room.

IBP's actions with the gloves supports the workers' testimony. IBP furnishes new gloves to the workers on a weekly basis. IBP provides pins to the workers to collect their dirty gloves at the end of each shift. IBP washes the gloves overnight and provides them for pick-up the next day before the shift begins. If a worker's gloves are missing, a foreman will assist in providing others. It is doubtful that IBP would expend this type of effort on something that was not integral and indispensable to the performance of the work. IBP's superintendent of the "B" shift in processing, Jack Ross, said as much.

IBP chooses to store the safety equipment in each worker's locker and to make the worker responsible for the storage and cleaning of the equipment. IBP chooses to dispense the gloves in various locations in the plant. While an employee is not necessarily working when he or she arrives at his or her locker, the fact that the necessary equipment is stored there and must be put on thereafter makes the work day start at a point in time that a worker must arrive at the locker to complete the donning and obtaining of necessary compensable equipment. The amount of time it takes to obtain

and don the equipment varies in accordance with the equipment used. For instance, it is likely that an employee who is required by the company to wear only a frock, safety glasses, hard hat, ear plugs, and hair net, would not be considered to be working upon arrival at his or her locker. On the other hand, a worker who is required to come to work 15 minutes early to turn on equipment that needed to warm up before work started probably would be engaged in work for the full 15 minutes, even though inactive after the first task. An employee who turned on his or her equipment immediately before starting is probably not engaged in work, even though some time is spent in doing this task before starting.

The Court finds that the representational testimony was adequate in proving what additional equipment was required beyond the Required Equipment Lists and equipment beyond the minimal equipment list and allocation of activities to work codes shall be in accordance with the Court's Order on Objections.

C. Meal Breaks. 29 C.F.R. § 785.19

29 C.F.R. § 785.19 provides, in relevant part, that:

> Bona fide meal periods are not worktime. . . . The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

There are no cases discussing what "special conditions" would permit an unpaid meal break of less than 30 minutes under 29 C.F.R. § 785.19(a). Regardless, 29 C.F.R. § 785.18 provides that no "special conditions" would permit an unpaid meal break of less than 20 minutes. "Rest periods of short

from 4 minutes to about 20 minutes are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked." *Id.*

1. Relieved of Duty Test

The Ninth Circuit has adopted the completely-relieved-of-duty test to determine whether an employee is relieved of his duties during meal breaks. *See Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975) (holding "[a]n employee cannot be docked for lunch breaks during which he is required to continue with any duties relating to his work"); *see also Biggs v. Joshua Hendy Corp.*, 183 F.2d 515 (9th Cir. 1950). The completely-relieved-of-duty test looks to whether the employee is, indeed, completely free of any work-related tasks. *See Wahl v. City of Wichita*, 725 F. Supp. 1133, 1143-44 (D. Kan. 1989); *see also Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 n.1 (4th Cir. 1985) (holding "[t]o qualify as a bona fide non-compensable break, the respite must be uninterrupted and at least thirty minutes in duration, and the employee must be completely relieved from duty.") "The employer bears the burden to show that meal time qualifies for this exception from compensation." *Bernard v. IBP*, 154 F.3d 259, 265 (5th Cir. 1999), *citing Roy v. County of Lexington, South Carolina*, 141 F.3d 533, 544 (4th Cir. 1998).

2. IBP—Failure of Relief of Duties During Meal Break

There is sufficient evidence to find that employees at IBP's Pasco plant are not completely relieved of duty during their meal break. IBP's own management testified that as early as 1988, IBP received complaints of employees receiving only 15-20 minutes at lunch. (See testimony of Ken Kimbro and Ex. 192.) Mr. Kimbro testified that IBP should have investigated these complaints, but decided not to do so. Furthermore, Defendant's own internal documents indicate

that employees were required to remove certain equipment before lunch and, by implication, were required to don equipment after lunch. In an internal IBP memo dated August 6, 1999 from Barb Salter, superintendent of the kill floor, to Lee Baczwaski, plant manager at Pasco, Ms. Salter states that when employees go to lunch and breaks "the employee must remove rubber apron, apron, gloves, sleeves and scabbard with chain. Frocks also for those that wear one. All other equipment is allowed to remain on." (Ex. 82.) The memo goes on to state that, when using the restroom, employees must remove "rubber apron, gloves, sleeves, mesh equipment scabbard with chain, frocks for those that wear one." Ms. Salter notes that "20% of slaughter employees wear no mesh equipment or scabbard and chain." (Ex. 82.) A similar memo was prepared on August 5, 1999 by Gary Johnson, superintendent of A shift, directed to Lee Baczwaski. Mr. Johnson states that when going to lunch or break, "employees must remove their gloves, sleeves, and frock." When going to the bathroom "they must remove their frocks, gloves, sleeves, and mesh equipment."

The IBP employee manual makes it clear that no frocks or knife equipment are allowed in the cafeteria and that "any type of protection worn outside of the frock must be removed." (Ex. 1 page 17.) The same is true of the bathroom. "All equipment must be removed before entering restrooms except hard hat." (Ex. 1 page 19.) The employee manual for IBP also notes that "employees *MUST* be at their work stations at the end of breaks, and rest periods. Failure to do this will be counted as an unexcused tardy." (Ex. 1 page 17; emphasis in original.)

3. Compensable Meal Break Time

Based on the compensable time categories above in section IIIB, if any employee receives 20 minutes or more during his or her lunch break, exclusive of time to don and doff the required equipment, he or she will receive that portion of her

meal break that is spent donning and doffing. If, in the calculation for a particular employee under the times outlined above, an employee falls under the required 20-minute break for her meal period, he or she is to be compensated for the entire 30-minute break. For example, an employee working on the kill floor who is paid at meal time for donning and doffing his or her rubber apron, apron, gloves, sleeves, and scabbard with chain, and mesh equipment[12] and walking times, would be spending 8.251 minutes of the meal time for compensable work activities, and should recover for 8.251 minutes. (See Ex. 1042.)

VI. Defenses

A. 29 U.S.C.A. § 203(o)

Sections 206 and 207 of Title 29 provide for minimum and overtime wages for employees. 29 U.S.C. §§ 206, 207. Section 203(o) creates an exclusion from compensable working time.

> In determining for the purposes of 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each work day which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o).

Courts have found a negotiated and subsequently deleted clothes-changing provision to be sufficient evidence of a custom or practice. *See, e.g., Nardone v. General Motors, Inc.*, 207 F. Supp. 336, 340 (D.N.J. 1962) (holding that policy of non-compensation for changing time existed because the

[12] The Court finds that employees are required to use the restroom during meal-time breaks.

negotiations were on an equal basis and the "collective bargaining agreement negotiations encompassed" the issue); *Hoover v. Wyandotte Chems. Corp.*, 455 F.2d 387, 389 (5th Cir. 1972); *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 675 (2nd Cir. 1994) (holding "[i]f the parties to a collective bargaining agreement negotiate over an issue and have an understanding that resolves it, then a 'practice' exists, even in the absence of express written terms.")

Defendants claim that because the clothes-changing provision was once in the collective bargaining agreement and has since been negotiated out, there is a custom or practice at IBP's Pasco plant. There was a provision for clothes changing time in the CBA's for the year 1976 and for the years 1979-1982, but such a provision was eliminated in 1982 and renegotiated and left out in 1992. The negotiated provision read "[c]lothes changing time for one-half hour per week shall be granted to all employees required to change their clothing before performing their work assignments." (Ex. 217 page 37.) John Carter testified that in 1999, the Union negotiated for 10 minutes a day of "clean-up time." (Ex. 249, page 1.) Mr. Carter testified that this was to include pre- and post-shift time, including washing mesh, putting on and taking off clothes and safety equipment. Mr. Carter did not know if this time included sanding steel. He also testified that the company would figure out if this time was overtime, or if they would start the chain later or end it earlier.

Even if the union did bargain away rights under 3(o), they are unable to negotiate and bargain beyond clothes changing and washing time. Union representatives may not bargain away employee rights under the FLSA. *See Featsent v. City of Youngstown,* 70 F.3d 900, 905 (6th Cir. 1995), *citing Walling v. Harnischfeger Corp.*, 325 U.S. 427, 431-32 (1945). The Ninth Circuit has held "that the FLSA's minimum wage and overtime provisions . . . are guarantees to individual workers that may not be waived through collective bargaining." *Albertson's, Inc., v. United Food & Commercial*

Workers Union, AFL-CIO & CLC, 157 F.3d 758, 761 (9th Cir. 1998) (*internal quotations omitted*) *citing Local 246 Utility Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292 (9th Cir 1996) (holding that where employees' claim is based on substantive rights under the FLSA no resort to arbitration under the CBA is required). *See also Collins v. Lobdell*, 188 F.3d 1124, 1127-28 (9th Cir. 1999) (holding that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement). The Supreme Court also has held that FLSA rights "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrantine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (*citations omitted.*) Conflicting provisions between FLSA and collective bargaining agreements are resolved in favor of the FLSA. *See id.*

Clothes changing and washing of the person will be excluded from compensability, as will donning and doffing of hard hat, ear plugs, safety glasses, boots, and hairnet. Clothes changing is limited to changing into and out of the frock, and washing time is limited to washing of the person. The union is not capable of bargaining away the union members' rights to overtime pay for putting on and taking off safety equipment but, rather, only has authority to negotiate clothes changing and washing under 3 (o).

Section 3(o) does not apply to meal-time claims by its express language and, therefore, frock time is excluded from pre- and post-shift activities, but not from meal-break compensability measures.

B. Good Faith Reliance—29 U.S.C. § 259(a)

Section 259(a) of the FLSA provides the following affirmative defense:

> In action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended . . . , if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified to subsection (b) of this section [the Department of Labor], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

The test under section 259 is an objective one. *See Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990) (holding no good faith reliance where employer's policy was not in conformity with the opinion letters upon which it alleged reliance).

IBP contends that it relied upon the issuance of several DOL letters and the DOL's practice of excluding IBP's union plants from litigation in making its decision not to compensate union employees for activities such as clothes changing, washing, sanding steel, and donning and doffing personal protective equipment. IBP's claim seems to be that because the non-union plant litigation covered both clothes changing and washing, which would be excluded from compensable time at the union plants by 3(o), and other activities, such as sanding steel and donning protective equipment, that DOL's policy position was that 3(o) covered all activities at the union plants, not just those specifically excluded by 3(o).

The evidence suggests, however, that the DOL never took a position beyond stating that 3(o) excludes union plants for

clothes changing and washing time. Kenneth Kimbro, Sr., Vice President for Human Resources at IBP, testified that he relied on materials he reviewed from the DOL. Mr. Kimbro testified that he relied on DOL's Response to IBP's objections to the injunction in the Kansas litigation. (Ex. 230.) In that response, DOL says that the decree does not apply to union plants and, in doing so, quotes the language of 3(o). This does not suggest that the DOL is altering or expanding the scope of 3(o) to include activities other than clothes changing and washing. Mr. Kimbro also testified that he had reviewed the DOL's pre-trial brief in the Kansas litigation and knew that the DOL was making a distinction between work clothing and personal protective equipment. (Ex. 1056.) The other documents upon which Mr. Kimbro testified that he relied are of similar substance. In a letter from Solicitor of Labor, Marshall Breger, to IBP attorney Eizenstat, Breger paraphrases section 3(o) and does not define clothes changing or washing. (Ex. 224.) In letters from Eizenstat to Breger, Eizenstat says what Eizenstat thinks 3(o) means. (Ex. 225.) Mr. Kimbro also testified that he knew the language of 3(o) does not apply to lunch breaks.

Mr. Kimbro testified that in December 1997, the DOL changed its previous position on clothes changing at union plants. (Ex. 64). But the letter, in fact, states that putting on, taking off, and washing of protective safety equipment are compensable activities under the FLSA if they are integral to an employee's principal activities. The DOL had never taken a position about the compensability of these activities. IBP, therefore, had nothing upon which to rely, other than its assumptions about what clothes changing and washing were included under 3(o).

C. Portal to Portal - 29 U.S.C. § 254(a) and "integral and indispensable"

The Portal to Portal Act limits compensable activities under the FLSA.

> [N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . .
>
> > (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time of any particular work day at which such employee commences, or subsequent to the time on any particular work day at which time he ceases, such principal activity or activities.

29 U.S.C. § 254(a).

The Supreme Court has created a narrow exception to the rule of noncompensability under the Portal to Portal Act when the activities "are an integral and indispensable part of the principal activities for which the [employees] are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). In *Steiner*, the Court held that post-shift washing by employees exposed to highly toxic lead compounds and fumes during the work day were compensable. *Id.* The test the Court created for finding which activities were integral and indispensable is whether (1) it was made necessary by the nature of the work, and (2) it fulfilled the mutual obligations between employer and employee. *Id.* at 256. *See also Mitchell v. King Packing*

Co., 350 U.S. 260, 263 (1956) (holding that knife sharpening is "principal" activity of butchers in meat-packing plant).

IBP claims that the activities claimed to be compensable by Plaintiffs fall under the Portal to Portal Act exception and were found not to be integral and indispensable by the Tenth Circuit in *Reich v. IBP*, 820 F. Supp. 1315, 1319 (D. Kan. 1993), *aff'd*, 38 F.3d 1123, 1125 (10th Cir. 1994) (holding only knife carrying employees performed any compensable activities and that standard protective items "were not so uniquely and closely related to the dangers inherent in meat production to make the wearing them an integral and indispensable part of the meat production workers' jobs.")

The evidence suggests, however, that at Pasco, donning and doffing personal protective equipment and sanding steel are made necessary by the nature of the work and fulfill mutual obligations between IBP and its employees. In an internal IBP memo dated August 6, 1999 from Barb Salter, superintendent of the kill floor, to Lee Baczwaski, plant manager at Pasco, Ms. Salter states that when employees go to lunch and breaks, "the employee must remove rubber apron, apron, gloves, sleeves and scabbard with chain. Frocks also for those that wear one. All other equipment is allowed to remain on." (Ex. 82.) The memo goes on to state that when using the restroom, employees must remove "rubber apron, gloves, sleeves, mesh equipment scabbard with chain, frocks for those that wear one." Ms. Salter notes that "20% of slaughter employees wear no mesh equipment or scabbard and chain." (Ex. 82.). A similar memo was prepared on August 5, 1999 by Gary Johnson, superintendent of A shift, directed to Lee Baczwaski. Mr. Johnson states that when going to lunch or break "employees must remove their gloves, sleeves, and frock." When going to the bathroom "they must remove their frocks, gloves, sleeves, and mesh equipment."

In addition, there was presented a "Required Personal Protective Equipment List, Pasco Complex, Minimum Safety Equipment Requirements, Slaughter Kill Floor." (Ex. 90.) The first line of text indicates that the list below is the minimum requirements "to be worn by ALL IBP Personnel while performing the following jobs." (Emphasis in original.) Similar documents were admitted for processing employees. (Ex. 91, 92, and 93.) This evidence suggests that the wearing of protective equipment is made necessary by the nature of the work.

While cloth gloves are not on these lists, testimony from employees suggested that these, too, were made necessary by the nature of the work. (Testimony of Ranoulfo Gutierez.)

Frocks also are not on this list. Testimony from James Lochner, CEO of fresh meat division at IBP, indicated that frocks were necessary to detect possible contamination. In any case, frock-changing time is found to be not compensable under 3(o), as it qualifies as changing clothes.

Hard hats, safety goggles, earplugs, a hairnet, and boots are not made necessary by the nature of the work.

Finally, there is some dispute about whether sanding steel is necessary by the nature of the work. The testimony presented indicates that for knife users, sanding steel is required to keep the edge of the knife straight. The evidence is that a straight-edged knife reduces danger to the employee and improves the employee's ability to perform his or her job. IBP's employee manual directs employees to sand their steel. (Ex. 1.)

The representative evidence establishes that class members engaged in both a pattern and a practice of pre-shift and post-shift FLSA work not subject to § 4(a) Portal to Portal Act, 29 U.S.C. § 254(a) restrictions.

VII. State wage and hours claim. RCW §§ 49.46.020, .130; 49.12.005; 49.52.050-.070

A. Overtime Claims—RCW §§ 49.46.020, .130

RCW § 49.46.130 provides that "every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [the minimum wage] except as may be otherwise provided under this section."

RCW § 49.46.130 provides that "[e]xcept as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

WAC 296-126-002(8) defines hours worked as including "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place." The Washington Supreme Court has looked to the FLSA for guidance in interpreting "hours worked." However, there is no 3(o) or Portal to Portal equivalent under state law. Interpretive Guideline No. ES-016 does state that "preparatory and concluding activities" are generally included in the definition of "hours worked," and RCW 49.12.187 states that "[t]his chapter shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representative of their own choosing concerning wages or standards or conditions of employment."

B. The MWA Provides A Minimum

The class members were employed by IBP on an hourly basis and, therefore, the MWA requires IBP to pay the class members at least the state minimum wage for all hours

worked. *See SPEEA v. Boeing*, 139 Wash. 2d 824 (2000). The state minimum wage was $4.90 per hour at the start of the MWA damages period herein on June 30, 1995; it increased to $5.70 per hour on January 1, 1999, and to $6.50 per hour on January 1, 2000. *See* RCW 49.46.020.

Other provisions permit collective bargaining to establish wages or other conditions of work only "in excess of the applicable minimum under the provisions of this chapter." RCW 49.46.110. *See also Lundborg v. Keystone Shipping Co.*, 138 Wash. 2d 658, 669-70 (1999). Washington and Ninth Circuit courts have held that rights provided by the Minimum Wage Act may not be waived or altered by a collective bargaining agreement *See Ervin v. Columbia Distrib., Inc.*, 84 Wash. App. 882, 891 (1997), *citing Local 246 Utility Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292 (9th Cir. 1996). *See also Schneider v. Snyder's Foods, Inc.*, 95 Wash. App. 399, 402 (1999) (holding that in enacting the protections under the Minimum Wage Act, "the Legislature has stated that collective bargaining agreements may establish wages or other work conditions only in excess of the statutory minimums").

C. IBP and State Law Claims—Overtime

The same analysis applies here to overtime claims as under the FLSA. The Washington standard may be more liberal but, in either case, the activities of donning and doffing safety equipment, getting cloth gloves, sanding steel, and frocks are compensable. WAC 296-126-002(8) defines hours worked as including "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place."

D. *Inniss*

Inniss was decided after the court denied IBP's motion for summary judgment on Plaintiffs' claims for minimum wage under the Washington Minimum Wage Act, and denied IBP's

motion for reconsideration of the May 24 order. Defendant contends that the Supreme Court expressly adopted a "weekly" standard for minimum wage compliance in *Inniss*, and again requests reconsideration of their motion or, in the alternative, certification of the issue to the Washington Supreme Court.

In *Inniss*, the Washington Supreme Court held that the employment practice of a "fluctuating workweek" did not violate the Washington Minimum Wage Act, chapter 49.46, when calculating overtime compensation at "one and one half times the regular rate" under RCW 49.46.130(1). *Inniss v. Tandy Corp.*, 141 Wash. 2d. 517 (2000). The relevance of this decision to the regular rate determination for hourly employees is unclear. The court specifically refers to 29 C.F.R. § 778.114, which relates to the regular rate in the context of a fluctuating workweek and provides that "[t]he 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act . . ." The regulation also provides, "such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight time compensation for long workweeks as well as short ones . . .". *See* 29 C.F.R. § 778.14(c). The *Inniss* decision is particular to determining the regular rate for employees under a fixed salary with fluctuating hours. However, the court declared that the WMWA was not violated "because the actual weekly compensation for each Petitioner was never less than the total weekly compensation based upon the minimum hourly wage under RCW 49.46.020." 141 Wash. 2d at 533-34. This Court can only apply, not expand, state law and, therefore, absent a clear indication from the Supreme Court, it will use an hourly standard.

E. State Meal Break Claims

In the Order on Objections the Court clarified its conclusion relating to state law meal break claims under WAC 296-126-092(1) to only allow recovery for the time spent working during the meal break up to 10 minutes under the state law claim, holding "[i]f the time spent working during the meal break exceeds 10 minutes, so that the total uninterrupted meal break is less than 20 minutes, the entire 30 minute period shall be recoverable." This conclusion was based on the fact that the Plaintiffs' claim under the MWA is brought to compensate employees for time worked for which they were not compensated. The interpretive guideline under the WAC 296-126-092 indicates that if an employee works during the meal period, the period is to be extended to give the employee a 30-minute meal break. This indicates to the Court that the purpose of both the MWA and the regulation are to allow for time as a remedy for a violation, not necessarily monetary compensation for the entire meal break, when only a portion of the meal break is spent working. This finding also is consistent with the FLSA provision for meal-break violations.

If the Court is reversed on appeal on its meal break ruling and Plaintiffs are held entitled to 30 minutes compensation for each meal break during which work was performed, then Plaintiffs would be able to recover $7,297,517, with interest thereon at the rate set by 28 U.S.C. § 1961, for damages calculated through May 14, 2000 and comprised of $5,487,561 in MWA overtime damages, $905,028 minimum wage damages, and $904,928 in rest break damages under Washington law (which includes (1) rest break prejudgment interest, and (2) meal break prejudgment interest for individuals who are not eligible for meal break double damages.)

F. Rest Break

On May 18, 2001, the Court granted Plaintiff's Motion for reconsideration of rest break claims. (Ct. Rec. 669.) The Court held that in *Wingert v. Yellow Freight Sys., Inc.*, 104 Wash. App. 583 (2001), the Washington Court of Appeals held that an implied cause of action exists under the Industrial Welfare Act for damages for lost wages relating to violations of Wash. Admin. Code § 296-126-092. The Court recognized that this decision was contrary to the Court's April 1999 order (Ct. Rec. 69) wherein the Court granted Defendant's Motion for Summary Judgment on Plaintiffs' separate claims for meal and break period violations, holding that Plaintiffs did not have a private right of action under Washington's Industrial Welfare Act.

The Court has denied Defendant's Motions to certify the question of the implied right of action to the Washington Supreme Court and also has denied Defendant's Motions to stay the rest break hearing until after the Washington Supreme Court determines whether it will review *Wingert*.

WAC 296-126-092 provides the following: "[e]mployees shall be allowed a rest period of not less than 10 minutes, on the employer's time, for each 4 hours of working time. . . . No employee shall be required to work more than three hours without a rest period." The court in *Wingert* held that this regulation does give rise to a private right of action and that this right cannot be negotiated away through union bargaining. *Wingert* at 595. Defendant points the Court to a DLI Interpretive Guideline ES0026 (1992) that stated that collective bargaining agreements supersede WAC 296-126-092. The Court finds this argument unpersuasive. IBP's own personnel manager testified that he was unaware of this guideline, so IBP could not have relied on it. Greg Mowat testified at trial that the DLI intended to remove that sentence, and the Supreme Court has held that state minimum substantive labor guarantees do not interfere with collective

bargaining rights. *See, e.g., Bradshaw v. Livadas*, 512 U.S. 107, 128-130 (1994); *Metropolitan Life Ins. Co. v. Davis*, 471 U.S. 724, 748-49 & n.27 (1985). The Court also rejects Defendant's argument that the difference in language between RCW 49.46.110, which provides that collective bargaining agreements can negotiate conditions above the minimum, and RCW 49.12.187, which contains no such limitation, suggests that unions can bargain away employees' rights to a second 10-minute rest break under the regulation.

The parties have stipulated that after the meal break, employees typically completed their shifts without a paid break. The Court finds that IBP is liable for a second 10-minute rest break, where employees worked 8 hours or more and no second rest break was provided. The Court will not offset the second 10-minute rest break by 5 minutes as a result of the first 15 minute break, as requested by IBP. The regulations requires a break every 4 hours, and providing one longer break period does not avoid the obligation for a second break, as required by the regulation.

G. Preemption

Finally, the Court rejects Defendant's preemption arguments. Under the preemption doctrine expressed in *Machinists*, the NLRA preempts state laws and state causes of action that regulate activity Congress intended to leave unregulated. *Lodge 76, Int'l Ass'n. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976); *Metropolitan Life Ins.*, 471 U.S. at 749. However, the *Machinists* preemption doctrine does not preempt a state law which "establishes a minimal employment standard not inconsistent with general legislative goals of the NLRA." *Metropolitan Life Ins.*, 471 U.S. at 757; *see also Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). "Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act."

Metropolitan Life Ins., 471 U.S. at 756 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, n.20 (1941)); *see also Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1038 (9th Cir. 1999). The regulations at issue here establish minimal employment standards and Defendant has not pointed to, nor has the Court found, any legislative goals of the NLRA inconsistent with the regulations at issue providing for meal and rest breaks.

VIII. Damages

The representative evidence establishes that class members performed off-the-clock work, *i.e.*, unrecorded and uncompensated work, pre-shift, post-shift, and during uncompensated meal breaks. Moreover, IBP failed to keep and maintain records of this off-the-clock work. As the FLSA and MWA protect individual rights, the Court holds that the recovery should also be based on an individualized basis as much as possible.

The Court holds that the Plaintiffs shall submit each employee's damage calculation. The Plaintiffs shall add the times required for each item of equipment, taking into account, if multiple items are used (*i.e.* four pair of cotton gloves), and the number of times the items are donned and doffed (*i.e.* may be donned and doffed twice, once at the beginning and end of work day and once at beginning and end of lunch). This calculation is to include equipment, not just from the employee's required equipment list, but also from the exhibits, testimony, and representative evidence indicating the equipment actually worn. Plaintiffs shall then add the time allotted for these activities with the time for walking and waiting calculated by Dr. Mericle. This information will then be aggregated to calculate the total amount of time worked by each employee. The Court believes that the evidence presented at trial allows for more narrow definitions of job categories, and that calculating damages on the more narrow categories is the most accurate method of determining

damages. Exhibits 178a, 178b, and 178c summarize class member damages based on the individual class member's work histories, individual statute of limitation dates, weekly on-the-clock work paid at regular hourly rates, and the payroll data CD-ROM produced by IBP. Plaintiffs shall substitute the above-described calculations for their current class member work performed for work codes set forth in Exhibits 74, 75, 1048 and the record herein. Plaintiffs are permitted to rely upon representative testimony to establish the equipment used and work performed by class members in job codes, as long as the evidence was introduced at trial. Work codes will be included if admissible evidence was introduced at trial about the job so that the appropriate equipment can be determined from the admitted evidence. The foundation for determining what job categories were entitled to damages and in what amount, are to be determined by reference to the representational evidence. The Court holds that the representational evidence was adequate to determine what work was done and in what amounts.

Plaintiffs are to give 4 minutes credit in their damages calculations of clothes changing time credit since July 1998, as Defendant has provided 4 minutes of paid clothing time since that date.

A. Liquidated Damages Under the FLSA

The FLSA provides for liquidated damages awards equal to back pay. 29 U.S.C. § 216(b). This is considered "'compensation for the retention of a workman pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *Reich v. Southern New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d. Cir. 1997). Section 11 of the Portal to Portal Act allows for a discretion-ary reduction of liquidated damages if the employer proves it acted in "good faith" with reasonable grounds for believing it was not violating the FLSA. 29 U.S.C. § 260. The employer "bears the burden of estab-

lishing, by 'plain and substantial' evidence subjective good faith and objective reasonableness." *Id.* "It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them." *Id.*

The Court holds FLSA liquidated damages are appropriate in this case. IBP has failed to prove § 11 Portal to Portal Act good faith. IBP has never attempted to measure, record, or compensate for substantial amounts of pre-shift, meal-break and post-shift work. When sued herein, IBP reacted by instructing employees to alter clock-in and clock-out closer to their production work times. (Ex. 16; Hester.) IBP was informed of employee complaints regarding meal time work in 1988, and failed to investigate. (Ex. 192; Kimbro.) IBP has failed to present any equitable considerations that would warrant denial of liquidated damages.

B. Double Damages Under State Law

Under RCW 49.52.050 & .070, an employer is liable for double damages if it "[w]ilfully and with intent to deprive the employee of an part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute . . . ." "Wilful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 159-160 (1998) (internal quotations omitted.) "Under a narrow exception to these statutes, double damages are not available if a 'bona fide dispute exists as to obligation of payment.'" *DLI v. Overnite Transp. Co.*, 67 Wash. App. 24, 34 (1992). "The dispute must be 'bona fide,' *i.e.*, a 'fairly debatable' dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid." *Schelling*, at 162; *DLI* at 35-36. Exemplary damages may be ordered on part of the wages owed where the amount of those wages is not subject to dispute. *See Schilling*, at 161 (citing *Brandt v. Impero*, 1 Wash. App. 678, 682 (1969)).

The Court holds IBP liable for exemplary damages for the meal-break violations, but not the rest break violations. IBP knew that meal breaks in Washington had to be "at least 30 minutes" and paid if work was performed. IBP never attempted to provide the employees with a 30-minute meal break. IBP knew employees had to doff and don equipment and that this took some amount of time. The Court finds that the record does not support a finding that class members knowingly submitted to these MWA damages. The Court finds that the FLSA and MWA recoveries are duplicative and, therefore, plaintiffs will only be able to collect judgment on one of the two claims.

The Court will not hold IBP liable for exemplary damages on the second rest break. The Court finds that while IBP willfully deprived employees of this second rest break, it reasonably believed that this rest period was negotiable. This is evidenced by the regulation that suggests cooperative bargaining is appropriate under this regulation, and the extensive negotiation history with the Teamsters regarding rest breaks. Therefore, the Court holds that as to the second rest break, a bona fide dispute existed regarding whether all or a portion of the wages must be paid." *Schelling*, at 162; *DLI*, at 35-36.

C. Attorney Fee

Plaintiffs are entitled to an attorney fee award pursuant to 29 U.S.C. § 216(b), RCW 49.46.090(1), RCW 49.48.030, and RCW 49.52.070, and are directed to file an attorney fee petition. Plaintiffs also are entitled to recover costs under 28 U.S.C. § 1920.

D. Sunshine Payments

IBP has sought to treat Sunshine payments as an offset. The Court finds that these Sunshine payments are in the nature of incentive pay, *i.e.*, a reward for working more efficiently and at greater speeds. In effect, IBP has been

making these payments to slaughter division employees for their production floor performance during their work shift. Sunshine pay is not payment for off-the-clock work, nor is it the type of premium pay that could offset overtime pay obligations under U.S.C. § 207(h). Similarly, Sunshine pay is not compensation for MWA off-the-clock work and does not offset MWA damages.

E. Prejudgment Interest

Prejudgment interest also is awarded on Plaintiffs' state law meal and rest break claims. Prejudgment interest is allowable only when (1) an amount claimed is "liquidated;" or (2) the amount of an "unliquidated" claim is for an amount of money that is "determinable by computation with reference to a fixed standard contained in [a] contract, without reliance on opinion or discretion." *Prier v. Refrigeration Eng'g Co.*, 74 Wash. 2d 25, 32 (1968). A "liquidated" claim is defined as one whose "exact amount is fixed and known." *Prier*, 74 Wash. 2d at 32, citing Charles T. McCormick, Damages (Hornbook Series), §54 (1935); *See also Taylor v. Shigaki*, 84 Wash. App. 723, 732 (1997). Defendant argues that the meal-break claims are not for a sum determinable without reliance on opinion or discretion, as there is no precedent in this area. This argument rests on a misperception of the requirement of a fixed standard and of what prejudgment interest is designed to accomplish.

Prejudgment interest is not awarded only in those cases where the law is clear on whether the amount claimed is owed but, rather, once it is determined that the amount is owed, whether the amount can be determined with exactness. "The fact that a dispute exists over all or part of a claim does not make the claim unliquidated. This is true 'even thought the adversary successfully challenges the amount and succeeds in reducing it.'" *Aker Verdal v. Neil F. Lampson, Inc.*, 65 Wash. App. 177, 190 (1992), quoting *Pier* at 33. "It follows from the foregoing that, where the amount sued for may

be arrived at by a process of measurement or computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest." *Prier* at 33-34. Here, the amount of recovery for the time spent working during the meal period is the time spent working, and if that time extends beyond 10 minutes, the entire 30-minute period is recoverable. The compensable time is easily determined by looking to the pay rates for employees and calculating the time spent working during the meal break on days where a meal break was required. Finally, pre-judgment interest is not to punish Defendant but, rather, to compensate the Plaintiffs for money wrongfully withheld. "Prejudgment interest is not a penalty imposed on a defendant for wrongdoing nor is its purpose to deter wrongdoing." *Hansen v. Rothaus,* 107 Wash. 2d 468, 475 (1987).

IT IS HEREBY ORDERED:

1. Plaintiffs are to present a proposed judgment consistent with this Order and with the Court's Order on Objections.

2. The Court will hear telephonic oral argument on the issue of injunctive relief on October 4, 2001 at 1:30 p.m. If the parties request oral argument in person they shall notify the Courtroom Deputy, Michelle Fox, by October 1, 2001.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 14 day of September 2001.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Nov. 28, 2003]

No.02-35042
D.C. No. CV-98-05005-RHW

GABRIEL ALVAREZ, individually and as class representatives; RANULFO GUTIERREZ, individually and as class representatives; PEDRO HERNANDEZ, individually and as class representatives; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Plaintiffs-Appellees,

v.

IBP, INC., a Delaware corporation,
Defendant-Appellant.

No. 02-35110
D.C. No. CV-98-05005-RHW

GABRIEL ALVAREZ, individually and as class representatives; RANULFO GUTIERREZ, individually and as class representatives; PEDRO HERNANDEZ, individually and as class representatives; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ

Plaintiffs-Appellants,

v.

IBP, INC., a Delaware corporation,
Defendant-Appellee

ORDER

Before: D.W. NELSON, THOMAS, Circuit Judges, and ILLSTON, District Judge*.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* The Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX D

29 U.S.C. § 203. Definitions

As used in this chapter—

* * * *

(*o*) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * *

29 U.S.C. § 204. Administration

(a) Creation of Wage and Hour Division in Department of Labor; Administrator

There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

* * * *

29 U.S.C. § 251. Congressional findings and declaration of policy

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the

results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey [41 U.S.C. § 35 et seq.] and Bacon-Davis [40 U.S.C. § 276a et seq.] Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

29 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act [41 U.S.C. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

* * * *

29 U.S.C. § 259. Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation

under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act [41 U.S.C. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C. § 276a et seq.], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.]—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act [41 U.S.C. § 35 et seq.]—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act [40 U.S.C. § 276a et seq.]—the Secretary of Labor.

APPENDIX E

29 C.F.R. § 790.1. Introductory statement.

* * * *

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

* * * *

29 C.F.R. § 790.6. Periods within the "workday" unaffected.

* * * *

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that

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[3] Sections 790.23 through 790.29 in the prior edition of this Part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

29 C.F.R. § 790.7. "Preliminary" and "postliminary" activities.

* * * *

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, "actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and

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[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

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[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

* * * *

29 C.F.R. § 790.17. "Administrative regulation, order, ruling, approval, or interpretation."

* * * *

(d) The term "ruling" commonly refers to an interpretation made by an agency "as a consequence of individual requests for rulings upon particular questions."[104] Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

* * * *

29 C.F.R. § 1910.1030. Bloodborne pathogens.

* * * *

(b) Definitions. For purposes of this section, the following shall apply:

* * * *

"Personal Protective Equipment" is specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (e.g., uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment.

* * * *

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[104] Final Report of the Attorney General's Committee, page 27. To the same effect in 1 Vom Baur, Federal Administrative Law (1942), p. 492.

APPENDIX F

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 6, 2002 [SEAL]

Samuel D. Walker
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Walker:

This responds to your letter of December 12, 2001, on behalf of the American Meat Institute, requesting reconsideration of two opinion letters issued by the Acting Administrator of the Wage and Hour Division and the Administrator of the Wage and Hour Division, respectively, on December 3, 1997, and January 15, 2001. The opinion letters concern application of section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o), to employees in the meat packing industry. Specifically, the letters set forth the position that section 3(o) does not apply to the putting on, taking off, or washing of the protective safety equipment typically worn in the meat packing industry, such as mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts.

As noted in the January 15, 2001 opinion letter, the construction of section 3(o) enunciated in the December 3, 1997 Opinion Letter had never previously been put forward by the Administrator. Further, a number of regional and district officials of the Wage and Hour Division and the Office of the Solicitor had, in their enforcement of some cases, historically applied section 3(o) if a bona fide collective bargaining

agreement excluded from hours worked the time spent by employees putting on, taking off and cleaning protective equipment.

We have completed a careful review of the interpretation of section 3(o) set forth in these opinion letters, as well as in the opinion letter issued by the Acting Administrator on February 18, 1998. It is our view, based upon a reexamination of the statute and legislative history, that the "changing clothes" referred to in section 3(o) applies to the putting on and taking off of the protective safety equipment typically worn in the meat packing industry, as described in your letter. It remains our view, however, that the term "washing" in section 3(o) applies only to washing of the person and does not apply to the cleaning or sanitizing of protective equipment. Accordingly, for the reasons set forth below, we are withdrawing as of this date the opinion letters dated December 3, 1997, February 18, 1998, and January 15, 2001 (as it relates to section 3(o)).

Section 3(o) of the FLSA, enacted in 1949, provides that an employer does not have to pay for time spent "changing clothes or washing at the beginning or end of each workday" if such time is excluded from working time "by the express terms or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o). (We take no position in this letter on what constitutes a custom or practice for purposes of excluding time under section 3(o), or on whether there is such a custom or practice by any employers in your industry.) The FLSA does not define the term "changing clothes or washing" for purposes of section 3(o), and we do not believe that a plain meaning of the term is evident from the statute. One dictionary defines "clothes" as "garments for the body; articles of dress; wearing apparel" (The Random House College Dictionary (revised ed. 1982)), and another defines "clothes" as *"articles*, usually of cloth, designed to cover, *protect* or adorn the body . . . ." (Webster's

New World Dictionary (2d college ed. 1982)) (emphases added). *See also* 29 C.F.R. § 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective *clothing*") (emphasis added). The Department's interpretative regulations on "hours worked," published in 1965, merely repeat the terms "changing clothes" and "washing." *See* 29 C.F.R. § 785.26.

The legislative history is specific only with respect to the interpretation of "washing." The House version of section 3(o) would have allowed the elimination from hours worked of any activity of an employee as provided by the express terms of, or custom or practice under, a collective bargaining agreement. *See* S. Rep. No. 640 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2241, 2255. The conference committee explained that it narrowed the scope of the provision by "limit[ing] this exclusion to time spent by the employee in changing clothes and *cleaning his person* at the beginning or at the end of the workday." *Id.* (emphasis added). This explicitly narrow reading of "washing" is supported by a statement in the debates that describes the conference agreement as "limit[ing]" the provision's application "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday." 95 Cong. Rec. 14875 (1949). *See also* 29 C.F.R. § 790.7(g) & n. 49 (interpretative rule addressing the Portal-to-Portal Act's test for preliminary or postliminary activities using the phrases "changing clothes" and "washing up or showering"); Wage and Hour Division's Field Operations Handbook 31b0l (using the phrase "wash up time" in discussing section 3(o) and "hours worked").

The legislative history does not specifically address the scope of "changing clothes" under section 3(o). The provision was enacted subsequent to the Portal-to-Portal Act of 1947, which in turn was enacted in response to the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.

680 (1946). In *Mt. Clemens*, the Supreme Court held that the time that employees spent walking to and from their work stations on the employer's premises was "hours worked." 328 U.S. at 691-92. The Court also found compensable, as a necessary prerequisite to the employees' production work, such preliminary activities as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger sheaths, preparing equipment, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools. *Id.* at 692-93.

The legislative history indicates that some clothes changing was expected to remain compensable after enactment of the Portal Act, and the Supreme Court has so held. *See Steiner v. Mitchell*, 350 U.S. 247 (1956). During debate on the Act, one of the bill's sponsors stated that the clothes changing and showering that might be required of "chemical plant workers" would remain a compensable principal activity. 93 Cong. Rec. 2297-98 (1947). The Supreme Court appended this legislative history to its decision in *Steiner*, where it held that the time spent by workers in a battery plant changing into and out of old work clothes and showering was compensable. Although "changing clothes and showering under normal conditions . . . ordinarily constitute 'preliminary' or 'post-liminary' activities excluded from compensable work time" under the Portal Act, the Court ruled, clothes changing and showering under the circumstances of this case are "an integral and indispensable part of the production of batteries." 350 U.S. at 249, 255-56. Thus, while the Portal Act excluded "ordinary" clothes changing from compensable time, other clothes changing that was not "merely a convenience to the employee" and that was "directly related to the specific work" remained compensable (93 Cong. Rec. 2297-98 (1947)).

The function of section 3(o) is to allow companies and unions to agree to treat as non-compensable clothes-changing

activities that otherwise would be compensable under the Portal Act. In stating that the Act invalidates such agreements in the case of protective gear in the meat packing industry, the 1997 opinion letter confined its reasoning to a single sentence where it explained that "clothes" has a "plain meaning" which excludes: (i) "protective" articles that (ii) may be "cumbersome in nature" and (iii) are "worn over . . . apparel." Upon review, we have concluded that none of these qualities should prohibit a company and union from regarding the gear worn in the meat packing industry as clothes for purposes of section 3(o).

The Department of Labor has described articles worn for protective purposes as clothing, and so has a leading dictionary. *See* 29 C.F.R. § 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective clothing"); Webster's New World Dictionary (2d college ed. 1982) ("clothes" are "articles, usually of cloth, designed to cover, protect or adorn the body . . ."). The Supreme Court has used the phrase "protective clothing" on more than one occasion. *See, e.g., Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 660-61 (1980) (the "Benzene" case) (plurality) (stating that compliance with an OSHA requirement "could be achieved simply by the use of protective clothing, such as impermeable gloves"); *United States v. Stanley*, 483 U.S. 669, 671, 690 (1987) (referring to clothing to protect from chemical exposure and radiation). Congress, in enacting the Portal Act, and the Supreme Court, in interpreting it in *Steiner*, recognized that the purpose of clothing specially worn for the workplace might well be protection. Indeed, it was in part precisely because the clothing at issue served protective purposes that, in the legislative debates and *Steiner*, Congress and the Court indicated that donning and doffing the clothing at issue was "integral" to the job and, accordingly, compensable.

That an article may he "cumbersome" also is no indication that it is not clothing. Many items of clothing are cumbersome. In the case of clothing worn for protective purposes in particular, it often will be more protective if it is larger, heavier, and therefore more cumbersome than street clothes. It would disserve the workers the Fair Labor Standards Act is meant to protect if employers who wished to introduce bulkier and more protective gear in the workplace knew that in doing so they would lose their ability to bargain with their union over the compensability of donning and doffing protective gear. Such an intent should not be attributed to Congress in interpreting 3(o). In addition to lacking basis in the statutory text and legislative intent, a distinction between apparel that is "cumbersome" and that which is not is vague, difficult to administer, and fails to provide useful guidance to employers and unions regarding the legitimate parameters of their agreements and practices.

Finally, that an item is worn on top of another item plainly is no reason to believe they are not both items of clothing.

There are other bases in the history and purpose of section 3(o) for concluding that a broader interpretation of the provision is appropriate. It is reasonable to assume that when Congress enacted section 3(o), it had in mind the kind of "clothing" at issue in the *Mt. Clemens* case just three years earlier; that case involved aprons and overalls, shirts, and finger sheaths. Finally, a less rigid definition of "clothes" comports with Congress's intent in enacting section 3(o), which was to give a measure of deference on this aspect of wage-hour practice to the agreements and judgments shared by companies and their employees' duly-designated representatives for purposes of negotiating the terms and conditions of employment. *See* 95 Cong. Rec. 11210 (1949).

In sum, for the foregoing reasons we believe that the term "clothes" in section 3(o) includes the protective safety equipment typically worn by meat packing employees.

Accordingly, we interpret "clothes" under section 3(o) to include items worn on the body for covering, protection, or sanitation, but not to include tools or other implements such as knives, scabbards, or meat hooks. Furthermore, the term "washing" refers only to washing of the person, and not to the washing, cleaning, or sanitizing of protective or safety equipment. *See Saunders v. John Morrell & Co.,* 1 WH Cases 2d 879 (N.D. Iowa 1991).

Sincerely,

/s/ Tammy D. McCutchen
TAMMY D. MCCUTCHEN
Administrator